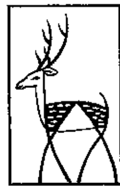
Landmark Cases in the Law of Contract

Edited by

Charles Mitchell and Paul Mitchell



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Preface

The essays in this collection, like the essays in the companion volume, *Landmark Cases in the Law of Restitution* (2006), grew out of papers presented at a symposium held at the School of Law, King's College London. We gratefully acknowledge the School's financial assistance.

As with the earlier collection, we gave authors a free choice of case, and complete freedom of method in how to approach their material. The results are predictably diverse: the cases range from the early 18th- to the late 20th-centuries, and deal with an array of contractual doctrines. Some of them call for their case to be stripped of its landmark status (*Smith v Hughes*), whilst others argue that it has more to offer than we have previously appreciated (*Suisse Atlantique*, among others).

But the essays also, perhaps surprisingly, share several common themes. Thus, mundane factual situations have frequently triggered elaborate legal responses (as, for instance, in *Coggs v Barnard*, *Pillans v Van Meirop* and *Johnson v Agnew*). Similarly, otherwise unremarkable transactions such as taking out an insurance policy (*Carter v Boehm*), hiring a theatre (*Taylor v Caldwell*), or a boat (*The Diana Prosperity*) can be thrust into the legal spotlight by external events. There is no need for the parties to be trying to achieve something novel for their contract to become the start of a landmark case.

Another striking theme is the influence of judicial personality and technique. In several cases, what made the decision a landmark was that individual judges had chosen to go beyond the arguments of counsel and develop the law as they felt appropriate. They might carry their brethren along with them (as in *Hochster v De La Tour*) or they might not (*Coggs v Barnard*). There was also a similarity about the kind of arguments used as catalysts for change. Appeals to 'reason' have flourished, perhaps inspired by Lord Mansfield's example, as have invocations of the Civil law (*Taylor v Caldwell*), even if they did not make it to the final draft of the judgment (*Coggs v Barnard*).

A further recurrent and fundamental argument, which has not been universally successful, concerns the role of contract law in facilitating commercial transactions. Some of our cases expressly acknowledge that contract law should fit commercial expectations: Lord Mansfield was probably the most famous exponent of this view (*Pillans v Van Mierop*, *Carter v Boehm*, *Da Costa v Jones*), but Lord Campbell, inspired by Mansfield, took the same line (*Hochster v De La Tour*). On the other hand, Lord Mansfield's innovative approach in *Pillans v Van Mierop* was short-lived, and the House of Lords in *Foakes v Beer* acknowledged that its decision was at odds with commercial expectations. The Court of Appeal's decision in *The Hongkong Fir* prioritised justice over

certainty, despite the commercial preference for the latter. On this fundamental question of policy the judges have been, and, we expect, shall continue to be, fundamentally divided. There can be little doubt that, as the courts continue to wrestle with this problem, the contract landscape will continue to change, and new landmarks will appear.

CHARLES MITCHELL
PAUL MITCHELL

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time of receipt by the seller/beneficiary. It can obviously be objected that such an approach is inconsistent with the orthodoxy that unilateral contract's binding force derives from (at least commencing) the stipulated counter-performance in reliance on the offer. However the House of Lords here was clearly and self-consciously expanding the unilateral contract device. It may be objected that Lord Diplock's account was obiter dicta. This will not wash because the obligatory nature of the vendor's obligation was essential to the holding in the case. He was compelled to perform the sale of shares in accordance with the true construction of his offer. It was not merely optional for him to sell to the plaintiff. He had irrevocably bound himself to do so. RT was not free to renounce its offer before it opened the sealed bids. It is just about possible to say that RT was not bound prior to the plaintiffs submitting the higher bid. However the reasoning is clearly wider than that.

One would have expected that academic commentators would have welcomed the House of Lords clearly providing a vehicle for binding irrevocable offers and similar proposals. Surprisingly the decision has been marginalised as unorthodox and has been largely forgotten. This should not be the fate of such a commercially sensible and rational decision. As I have sought to argue it provides an explanation for the binding force of letters of credit.

Returning to Goode, he concludes[157]:

> The state of English jurisprudence on letters of credit is rather curious. It is well over two hundred years since Lord Mansfield's valiant attempt in *Pillans v Van Mierop* (a case involving what was in essence a letter of credit) to demonstrate that contracts were enforceable without consideration was defeated by the House of Lords in *Rann v Hughes* and to this day there is no reported English case which directly holds that a letter of credit becomes binding on receipt despite the lack of consideration in the ordinary sense. . . . But there are dicta in several cases in which the courts have taken it for granted that letters of credit are enforceable undertakings and any argument to the contrary would be likely to receive short shrift at the hands of the judiciary.

Accordingly consideration fundamentalism is eschewed where commercial necessity demands it. Either as a unilateral contract, a sui generis rule, or on Professor Goode's broader conception of autonomous or abstract payment undertakings, the promises are enforced. The spirit of Lord Mansfield and his bold proposition still hold considerable sway. Whilst his boldest proposition in *Pillans* has not yet been accepted, his underlying philosophy remains crucial in contract law and underpins commerce and finance now as then.

[157] Goode, 'Abstract Payment Undertakings' (n 107 above) 218–19.

3

Carter v Boehm (1766)

STEPHEN WATTERSON*

A. INTRODUCTION

ON 9 MAY 1760, an insurance policy was effected in London on the instructions of Roger Carter, then Deputy Governor of the East India Company's factory at Fort Marlborough, Bencoolen, Sumatra. These instructions had been dispatched from Bencoolen more than eight months previously, addressed to Roger Carter's brother and agent in London. The policy ultimately effected covered the risk of a European enemy assault on Fort Marlborough for one year running from October 1759. However, events had already taken a fateful course. On 5 February 1760, a French privateering expedition under the command of the Count D'Estaing had arrived off the West Coast of Sumatra. Within 10 days, Natal and Tapanouly, two of the East India Company's subordinate settlements to the north of Bencoolen, had fallen. Another six weeks later, D'Estaing's ships had appeared in the sea off Fort Marlborough. By 3 April 1760, it too had fallen into French hands, and the Company's servants there, including Roger Carter, had surrendered and been taken prisoner. Over the ensuing six weeks, the Company's remaining settlements on the West Coast fell to D'Estaing's men.

Carter's resulting insurance claim was resisted by the underwriters on the ground of non-disclosure. It was finally upheld only after protracted litigation, which culminated in the reported decision of the Court of King's Bench in *Carter v Boehm*.[1] Lord Mansfield's judgment in that case unquestionably ranks as a landmark in the development of the law of non-disclosure between parties to insurance contracts. Unfortunately, more than two centuries on, and as the

* I am very grateful to Charles Mitchell and Francis Rose for their comments on an earlier draft of this chapter, and to the staff of the British Library's Asian and African Studies Reading Room for their patience during my long trawls through the India Office Records. I am also indebted to the Society of Legal Scholars, from whom I received a grant to undertake the archival research on which this chapter is substantially based. Any errors are solely my responsibility.

[1] *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162; (1766) 1 Black W 593, 96 ER 342. The reported decision is of the Court of King's Bench, hearing and dismissing the insurer's motion for re-trial, which had been brought after a verdict had been given for the insured by a special jury sitting with Lord Mansfield at Guildhall. Lord Mansfield delivered the opinion of the court.

case is relegated to the footnotes of modern texts, its real significance can be missed. As the leading early authority in an area of the law that has come to be viewed—and often criticised—as dramatically pro-insurer in orientation, it is easy to assume that *Carter v Boehm* shared that bias. Little could be further from the truth. Lord Mansfield began his judgment in *Carter v Boehm* with an unprecedented statement of common law principle, one purpose of which was to explain the many circumstances in which an insurer could *not* avoid liability for material non-disclosure by a prospective insured. The same orientation is also evident in the robust manner in which Lord Mansfield proceeded to apply those principles to the case at hand. Every ground for resisting liability offered by Charles Boehm, the underwriter named as defendant in the 1766 litigation, was rejected.

As this area of the law is currently under the scrutiny of law reformers once more,[2] it seems timely to remind ourselves of this important historical reality. To this end, this chapter proceeds in three stages. It begins by outlining so much general historical background as is required for a proper understanding of the litigation, before looking more closely at the nature of Carter's insurance policy. It concludes by revisiting Lord Mansfield's judgment, focusing first on Lord Mansfield's seminal statement of the law of non-disclosure, and then on the court's resolution of Boehm's arguments for avoiding liability.

B. THE GENERAL HISTORICAL BACKGROUND

1. Fort Marlborough, Sumatra

In the early stages of the English East India Company's life, the spices of South-East Asia were thought to offer some of the richest pickings for European traders. To this end, the Company maintained an important trading presence at Bantam, West Java, for much of the 17th century. This foothold was lost in the early 1680s, when the local sultan awarded the privilege of exclusive trade in his territories to the Company's main regional trading rival, the Dutch East India Company. Forced to look elsewhere to continue its involvement in the region's pepper trade, the Company turned to the neighbouring island of Sumatra. A mission culminated in the establishment of a fortified trading settlement in 1685 at Bencoolen, on the West Coast of Sumatra.[3] The fortified settlement was moved two miles to the south of its initial site over the period 1712–16, where 'Fort Marlborough' was established.[4]

[2] See Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (LCCP No 182, 2007).

[3] See, eg J Bastin, *The British in West Sumatra (1685–1825)* (Kuala Lumpur, University of Malaya Press, 1965) xi–xiii. The introductory chapter to this collection of sources contains a brief historical overview of the factory's history from its foundation until 1824.

[4] Bastin, *The British in West Sumatra* (n 3 above) xvii.

By the mid-18th century, the Company's influence on the West Coast had grown to the point where Fort Marlborough was served by a series of coastal out-settlements—including Tapanouly, Natal, Moco Moco, Ippo, Cattown, and Laye to the north, and Salooma, Manna, Cawoor, and Croce to the south. Nevertheless, as in India, where the European Companies characteristically maintained trading centres in close proximity, the English Company was not alone in this region. The Dutch Company maintained trading settlements on the West Coast. Furthermore, in very close proximity on Java lay Batavia, the Dutch Company's headquarters in the East Indies and the hub of a vast Dutch trade network.[5] The English Company would maintain its presence on the West Coast, and an uneasy relationship with its Dutch neighbours, until 1824, when all of its establishments there were finally ceded to the Dutch.[6]

As its name might imply, the settlement at Fort Marlborough was fortified and garrisoned by a small private army.[7] Nevertheless, this was only for the protection of what was fundamentally a trading community, run by merchants in the Company's civil service. Up to the time of its loss in 1760, Fort Marlborough was a subordinate Company factory, under the close supervision of the Company's Presidency at Fort St George, Madras. As such, it was headed by a 'Deputy Governor' and Council, comprising the most senior members of the 25–50 covenanted civil servants stationed there from time to time. To understand the insurance claim in *Carter v Boehm* it must be appreciated that these civil servants led double lives. On the one hand, they were employed to conduct the Company's commercial affairs on Sumatra. This meant, first and foremost, managing the procurement of pepper from the West Coast's plantations, and its safe consignment on the East Indiamen that arrived from London each year. On the other hand, these same civil servants were also private merchants. By the terms of their employment with the Company, they had the privilege of private trade within the East Indies. It was from this private 'country trade', rather than the Company's salaries, that fortunes might be made.

Roger Carter's early career path seems typical of the young men who sought their fortunes as covenanted civil servants at Bencoolen in the first half of the 18th century. Born in 1723, a younger son of a Lincolnshire landowning family, Roger could have had no expectation of inheriting the family's lands.[8] No doubt for this reason, his father, William, petitioned the Court of Directors of the East

[5] See, for a short overview, EM Jacobs, *In Pursuit of Pepper and Tea—The Story of the Dutch East India Company* (Zutphen, Walburg Pers, 1991) 73–8.

[6] Treaty Between His Britannick Majesty and the King of the Netherlands Respecting Territory and Commerce in the East Indies, 17 March 1824, Art IX (extracted in Bastin, *The British in West Sumatra* (n 3 above) 190, document 154).

[7] See generally AJ Harfield, *Bencoolen—A History of the Honourable East India Company's Garrison on the West Coast of Sumatra (1685–1825)* (Barton-on-Sea, A&J Partnership, 1995).

[8] The Redbourne Hall deposit held at the Lincolnshire County Archives contains a substantial deposit of documents relating mainly to the Carter family's Lincolnshire estates. The Lincolnshire Archives' Committee, *Archivists' Report No 8* (1956–57) 45–51, usefully summarises the process by which the family acquired and then lost the estates.

India Company in 1741 to have Roger appointed Writer at Bencoolen.[9] The petition succeeded, and in the 14 years that followed his arrival on the West Coast in August 1742, Carter rose steadily through the Company's ranks at Fort Marlborough. After five years as Writer, he rose to Factor[10]; by 1753, he had joined the Council[11]; and by early 1756, he was fourth in Council, soon to be third.[12] By this time, however, he had already made the decision to resign the Company's service and return to London,[13] apparently in a bid to secure his elevation at Fort Marlborough, or some favourable posting elsewhere. The bid succeeded. Arriving in London in late 1756, Carter tendered his services 'in whatever manner may be conducive to the Service of the Company'.[14] The Court of Directors decided that he was the right man to be the new Deputy Governor at Fort Marlborough, at the head of a re-modelled Council of nine.[15]

2. The Emerging Threat of a French Attack on Fort Marlborough

Roger Carter did not finally set foot again at Fort Marlborough, to take up his new position as Deputy Governor, until May 1758.[16] In the two years since his departure, events had taken a momentous change of course. The Seven Years' War had begun in Europe; by May 1756 England and France were at war once again; and within a short space of time, direct Anglo-French conflict had spread to India. Fort Marlborough itself was not to remain untouched for long. In mid-August 1759, reliable intelligence reached Deputy Governor Carter that the French had had definite plans to send a substantial force to surprise Fort Marlborough in the previous year. Within six months, in February 1760, these

[9] India Office Records ('IOR') IOR/B/66, Minutes of Meeting of Court of Directors, 6 January 1741, 489. The records show that he was joined by his youngest brother, Lumley, two years later, but that Lumley died in a smallpox outbreak after just over five years.

[10] IOR/G/35/9, List of Covenanted Servants on the West Coast, 1747–48, folio 176 (recording Roger Carter's arrival as Writer on 27 August 1742).

[11] IOR/G/35/9, List of Covenanted Servants on the West Coast, end 1753, folio 426 (sixth in Council). Cf IOR/G/35/9, List of Covenanted Servants on the West Coast, end 1752, folio 390 (not yet on Council).

[12] IOR/G/35/69, Diary and Public Consultations—Fort Marlborough, folio 74v, Account of salary due to Company's servants, 25 December 1755–25 March 1756.

[13] IOR/G/35/68, Diary and Public Consultations—Fort Marlborough, 4 September 1755, folios 138, 138v, 139, and 139v.

[14] IOR/B/74, Minutes of Meeting of Court of Directors, 1 December 1756, 207.

[15] IOR/B/74, Minutes of Meeting of Court of Directors, 17 December 1756, 224. Carter would probably have reached this position in any event, had he remained. By their general letter of 3 December 1755, which did not arrive at Fort Marlborough until after Carter had departed, the Court of Directors provided for a remodelled Council, effective from the letter's receipt, which would have seen Carter leap to second in Council behind a man who had made a similar decision to return to Europe shortly before Carter's own: see IOR/G/35/31, Rough Drafts of Dispatches to Fort Marlborough, Letter from the Court of Directors to Fort Marlborough, 3 December 1755, folio 20 ff, para 67.

[16] IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 15 May 1758, folio 63v (diary entry).

rumours became reality, when the Count D'Estaing's privateering expedition arrived on the West Coast. It is to these developments that our attention must now turn.

(a) Anglo-French Commercial Rivalry and War in the East Indies

To explain the reasons for the French assault on the West Coast in 1760, and the extent to which this attack could have been anticipated in the preceding months, something must be said about the wider political and economic context.

The assault ultimately had its origins in the long-standing commercial rivalry between the English and French East India Companies in India, and the global war into which England and France were drawn in 1756. The English and French Companies[17] had both maintained a significant trading presence in India for much of the 18th century. By the mid-century, the English Company's interests centred on the three Presidencies at Bombay, Fort William (Calcutta) in Bengal, and Fort St George (Madras) on the Coromandel Coast. The French Company's East Indies headquarters lay south of Madras, at Pondicherry; but like the English Company, it also had a number of lesser settlements, particularly on the Coromandel Coast and in the rich province of Bengal. Also in French possession were the islands of Mauritius (L'Isle de France) and Réunion (Bourbon), important bases for the provisioning and shelter of French shipping.

The two Companies had intermittently come into direct armed conflict in India during the War of Austrian Succession. Less than a decade later, when England and France were drawn into the Seven Years' War in May 1756, a renewal of such hostilities, supported by the Companies' respective governments, was virtually inevitable.[18] Almost immediately, the French Government and Company began to prepare a massive combined armament at Brest and Port L'orient, destined for the East Indies, under the command of Lally, the new French Governor-General. The three divisions left Europe in December 1756 and May 1757. Observing these preparations, the English Government also dispatched a small squadron to India in March 1757, to reinforce the Company and royal forces already in the region. Further reinforcements followed in subsequent years.[19]

[17] A recent readable English language introduction to the history and trade of the French East India Companies is DC Wellington, *French East India Companies—A Historical Account* (Lanham, Hamilton Books, 2006). A classic English language account, dedicated to French interests in India from the earliest times until Pondicherry's fall in 1761, is GB Malleson, *History of the French in India*, 2nd edn (London, WH Allen & Co Ltd, 1893).

[18] This war was a truly global conflict. England was brought into conflict in Europe on the side of Prussia against an alliance of France, Austria, and Russia; and in North America, the West Indies and India, against France. Spain entered the conflict belatedly in 1761.

[19] For these developments, see, eg Malleson, *History of the French in India* (n 17 above) 507 ff; JS Corbett, *England in the Seven Years' War* (London, Longmans, Green & Co, 1907) vol 1, ch 14, 336 ff; JR Dull, *The French Navy and the Seven Years War* (Lincoln, University of Nebraska Press, 2005) 62–3, 83, 116–17.

Direct Anglo-French conflict in India re-ignited first in Bengal, and then on the Coromandel Coast, where the French forces finally arrived from Europe in September 1757 and April 1758.[20] They initially secured important successes in that region. Cuddalore rapidly fell in May 1758, followed by Fort St David in June 1758. A delay of several months then followed before the next great military effort began. On 12 December 1758, Lally's forces laid siege to Fort St George. Nevertheless, Fort St George did not fall, and on 16 February 1759, the siege was raised. Thereafter, the tide of the conflict in India increasingly favoured the English forces to the point where, by the summer/autumn of 1760, the last French stronghold at Pondicherry was encircled by land and blockaded by sea. In January 1761, after several difficult months, Pondicherry capitulated.

One factor in this outcome, important to understanding *Carter v Boehm*, was the disposition of the French fleet under D'Aché's command, at critical moments in the conflict.[21] The spring/summer of 1758, which had brought direct conflict between the English and French land forces on the Coromandel Coast, had also brought two inconclusive engagements between the naval squadrons of D'Aché and Pocock in April and August. Not long after the latter, D'Aché insisted on returning with his ships to Mauritius, where his forces were reinforced by several more ships, and troops, from Europe. These new arrivals exacerbated an already chronic shortage of resources at Mauritius, and D'Aché was thus forced to send 12 of his ships to the Dutch colony at the Cape of Good Hope for the winter of 1758–59. In the absence of D'Aché's fleet on the Coast during those months, English ships were able to relieve the besieged Fort St George, and the besiegers, at the end of their own supplies, were forced to abandon the siege. It was not until some time in August 1759 that D'Aché's fleet finally reappeared off the Coromandel Coast. After another inconclusive engagement on 10 September 1759 with Pocock's squadron, D'Aché's ships were able to land reinforcements and supplies at Pondicherry, but then immediately left for Mauritius once again. That was the end of the fleet's effective involvement in the conflict: it remained there throughout 1760. In early 1760, a terrible storm devastated D'Aché's fleet at Mauritius. Before it could depart again, D'Aché received strict orders from France, ordering the fleet to remain at Mauritius in anticipation of a rumoured English assault on the Mascarene Islands. Lally's forces, besieged at Pondicherry, awaited the fleet's return in vain.

[20] For the course of the ensuing conflict, see, eg Malleson, *History of the French in India* (n 17 above) ch 12 and Corbett, *England in the Seven Years' War* (n 19 above) vol 1, ch 14, and vol 2, ch 4.

[21] For these developments, see, eg Malleson, *History of the French in India* (n 17 above) ch 12, esp 516–19, 523–5, 531–2, 553–6, 574–5; Corbett, *England in the Seven Years' War* (n 19 above) vol 1, 346–50 and vol 2, ch 4; and Dull, *The French Navy and the Seven Years War* (n 19 above) 116–17, 141, 172–3.

(b) Contemplation of a French attack on Fort Marlborough

From as early as 1755, the Court of Directors in London, and the West Coast servants, realised that the renewal of Anglo-French war in Europe meant that the Company's interests on the West Coast of Sumatra might be possible objects of French attack. Beginning in 1755, the Court of Directors' general dispatches to the Council at Fort Marlborough related the developing conflict in Europe and what intelligence the Company had of the strength of the forces anticipated for the East Indies. These same letters repeatedly warned the Council to be on their guard, and ordered them to prepare as best they could.[22] The urgency of those warnings measurably increased as the massive French armament was being prepared and dispatched from Brest and Port L'orient for the East Indies.[23] Nevertheless, at this stage, the risk to Fort Marlborough was apparently perceived to be small. The primary target of the French forces was imagined to be India, where Anglo-French rivalry was long-standing and the commercial stakes were highest. The accuracy of this prediction would have been confirmed when news finally arrived at Fort Marlborough and in London of the arrival of Lally's forces at Pondicherry in April 1758, and the ensuing engagements on the Coromandel Coast.

During this time, Roger Carter and his Council at Fort Marlborough appear to have existed in a low-level state of alert. Intelligence slowly arrived of the turbulent events in India, usually via John Herbert, the Company's agent at Batavia. However, none of this intelligence gave the Council reason to think that Fort Marlborough was directly under threat. The Council's principal concern was different: viz, that the conflict in India might disrupt its usual supply routes with the Company's Presidencies there, and leave it critically short of important supplies.

This low-level state of alert changed dramatically in August 1759. The events that brought this change can be traced through the deliberations and correspondence of the Fort Marlborough Secret Committee. This Committee was first established in June 1758, on the basis that there might be circumstances which it might be desirable to avoid being made public 'in the present state of affairs'.[24]

[22] IOR/G/35/31, Rough Drafts of Dispatches to Fort Marlborough, Letter from the Court of Directors to Fort Marlborough, 3 December 1755, folio 20 ff, para 75; *ibid* 29 December 1756, folio 48 ff, para 5; *ibid* 8 February 1758, folio 79 ff, paras 4–5; 8 November 1758, folio 101 ff, paras 5–7; *ibid* 13 February 1759, folio 111 ff, paras 5–8.

[23] IOR/G/35/31, Rough Drafts of Dispatches to Fort Marlborough, Letter from the Court of Directors to Fort Marlborough, 8 February 1758, folio 79 ff, paras 4–5. Cf subsequently, *ibid* Letter 13 February 1759, paras 5–8, which is more optimistic in tone.

[24] IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 30 June 1758, folio 83v (decision to create committee); IOR/G/35/12, Letter from Fort Marlborough to the Court of Directors, 10 March 1759, folio 35 ff, para 75 (reporting this decision).

Nevertheless, for almost a year afterwards, nothing of that nature emerged,[25] and the Committee did not meet for the first time until May 1759.[26]

First came a false alarm. On 18 May 1759, the *Anna Catherina* arrived at Fort Marlborough from Batavia.[27] The sloop had been specially hired there by John Herbert, to provide speedy delivery of an important packet of secret correspondence. Two letters conveyed important news about the conflict in India—in particular, the commencement and progress of the siege at Fort St George.[28] A third, dated 5 April 1759, was of more immediate significance. In it, Herbert related third-hand reports of what were said to be nine French ships bound for Bencoolen, and of a French ship and sloop, waiting in the Straits of Sunda[29] to intercept English shipping. Herbert doubted the first report, but had thought the second sufficiently credible to require special precautions for the security of the *Anna Catherina*'s packet of correspondence. By the time Herbert's letter reached the Secret Committee at Fort Marlborough, however, it was apparent that neither sighting was accurate. His letter was read at the Secret Committee's first meeting on 18 May 1759, but no action was taken.[30]

Three months later, in August 1759, the Secret Committee reacted very differently. On 14 August, a new bundle of correspondence arrived from Batavia, again from John Herbert. One letter brought good news: Herbert reported that the siege of Fort St George had been raised on 16 February 1759.[31] The other news was more ominous. Herbert reported a major Dutch armament at Batavia, ostensibly bound for the Coromandel Coast to protect the Dutch settlements there, but believed to be destined for an offensive in Bengal.[32] Even more crucially, Herbert also forwarded a letter to Roger Carter from Alexander Wynch, dated 4 February 1759 at the Cape of Good Hope.[33] This letter is highly significant to an understanding of *Carter v Boehm*.

25 IOR/G/35/12, Letter from Fort Marlborough to the Court of Directors, 10 March 1759, folio 35 ff, para 75 (nothing yet under secret heading); IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, para 1 (reporting that several matters had occurred of a nature not proper to be immediately made public).

26 IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 18 May 1759, folios 266–7.

27 IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 18 May 1759, 148 (diary entry).

28 IOR/G/35/12, Letter from John Herbert, Batavia, to the Secret Committee, Fort Marlborough, 15 March 1759, folios 258–9v (commencement of siege on 12 December 1758); IOR/G/35/12, Letter from John Herbert, Batavia, to the Secret Committee, Fort Marlborough, 18 March 1759, folios 259v–60 (progress of siege up to 16 January); IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 18 May 1759, folios 266–7. These communications were pre-empted by news brought by the *Welcome* private trader, which arrived from Bengal on 30 April 1759: IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 30 April 1759, 134 (diary entry); *ibid* 4 May 1759, 137–8 (news reported).

29 These are the straits separating Sumatra and (to its south) Java.

30 IOR/G/35/12, Letter from John Herbert, Batavia, to the Secret Committee, Fort Marlborough, 5 April 1759, folios 260–61v; IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 18 May 1759, folios 266–7.

31 IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 15 August 1759, 254 (reporting the contents of a letter from John Herbert, Batavia, of 5 July 1759).

32 The news was conveyed by duplicates of letters sent directly to Fort St George, which John Herbert had dispatched to Fort Marlborough: see IOR/G/35/12, Letter from John Herbert, Batavia, to Fort St George, 16 June 1759, folios 280–81; *ibid* 5 July 1759, folios 281–2.

(c) Alexander Wynch's Letter

Wynch was a man known to Roger Carter. He had been an East India Company employee in India for over 20 years, and latterly a Council member at Fort St George, the Presidency to which Fort Marlborough was subordinate.[34] In mid-1756, Wynch was appointed acting Deputy Governor at Fort St David, where he remained until 2 June 1758, when the place surrendered to Lally's forces following a short siege.[35] Wynch was released by the French in October 1758, whereupon he resigned from the Company's service on the grounds of failing health and took his passage for Europe,[36] apparently on a Danish ship.[37] It is likely that the vessel on which Wynch departed stopped at the Dutch colony at the Cape of Good Hope for the purposes of provisioning or repair.[38] In any event, there is no doubt that Wynch's stay at the Cape coincided with the substantial gathering of French ships which D'Aché had dispatched there for the winter of 1758–59.[39]

Wynch's purpose in writing was to transmit intelligence of the strength of the French forces gathered at the Cape, so that the Company's servants and the English forces on the Coromandel Coast might know the extent of the French forces that were expected to arrive there in mid-1759. To this end, letters were dispatched to Batavia, for transmission to Fort St George and Admiral Pocock,[40] and to Fort Marlborough[41]; the same news was communicated to the

33 IOR/G/35/12, Letter from Alexander Wynch, Cape of Good Hope, to Roger Carter, 4 February 1759, folios 262v–4.

34 For early biographical information, see H Davison Love, *Vestiges of Old Madras 1640–1800* (London, John Murray Ltd, 1913) vol 2, esp 318–19, 390, 394, 401, 437, 477, 481–2 and vol 3, esp 3–5.

35 Davison Love, *Vestiges of Old Madras* (n 34 above) vol 2, 482. Details of the capitulation, including the articles of capitulation signed by Wynch et al, can be found in IOR/H/95, 145–7, 212–13.

36 Davison Love, *Vestiges of Old Madras* (n 34 above) vol 2, 482.

37 See, eg IOR/H/95, Letter from Capt Martin to Rt Hon William Pitt, undated, folio 171 ff.

38 For a description of the Dutch colony, the so-called 'tavern of the two seas', see CR Boxer, *The Dutch Seaborne Empire 1600–1800* (London, Penguin Books, 1965) ch 9. In the 18th century, there were often more foreign sails anchored there than Dutch; there were profits to be made from selling local produce and services to foreign Indiamen: *ibid* 276.

39 See 64 above.

40 IOR/P/D/41, Military and Secret Consultations—Madras, 26 June 1759, 298–9, recording the receipt of two letters from Wynch of 4 and 23 February 1759, from Batavia via a Dutch ship.

41 IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 22 August 1759, folios 267–9, considering Wynch's letter of 4 February 1759, received from Batavia on 14 August 1759, with a request to forward a copy of the same intelligence to Madras. The Fort Marlborough Secret Committee correctly concluded that it was then too late in the season for any purpose to be served by that precaution.

Company in London by letters received via Copenhagen.[42] All of these letters also conveyed the further piece of intelligence which was of critical significance to Carter: viz, the news of French plans to attack Fort Marlborough.

The letter sent to Roger Carter at Fort Marlborough, dated 4 February 1759, related[43]:

> From a Conversation I had with some French Gentlemen I find your Place attracts their Notice, and that there was a scheme last Year of sending a Ship with about 400 Military to surprize your Settlements, this I judged proper to mention to you that you might be upon your Guard, should they hereafter put [it] in practice.

The corresponding letter sent to Fort St George, of the same date, elaborated[44]:

> I learnt from some French Gentlemen, that there was an Intention the last Year *of sending the Ship they took from the Dutch*, with about 400 Military to Bencoolen in order to surprize that Settlement; this then mentioned to Mr Carter, that he may be upon his Guard, should they at any time hereafter put a Scheme of that kind into Execution (emphasis added).

Viewed in context, Wynch's intelligence has an important degree of plausibility. Although Wynch might have learned of the French plans during his imprisonment after the capitulation of Fort St David, the best analysis is that this was new intelligence, subsequently obtained from conversations with Frenchmen who landed at the Cape colony from the French ships whose movements Wynch was witnessing and reporting. The Dutch ship in question was almost certainly the ship captured by D'Aché near Pondicherry in early August 1758, in retaliation for the Dutch action at Negapatam, in allowing a French ship there to be seized by the English squadron.[45] The ship's use in an opportunistic raid on the West Coast's settlements has particular plausibility, in light of the financial difficulties which hindered the progress of Lally's forces from their arrival on the Coromandel Coast in late April 1758, and which left Lally unable to pay or properly provision his troops. These difficulties had led Lally, shortly after Fort St David's capitulation on 2 June 1758, to postpone immediate plans for a further assault on the English Company's settlements, to enable him to divert a substantial number of his troops on a two-month expedition against Tanjore, in search of money and supplies.[46]

[42] IOR/B/75, Minutes of Meeting of Court of Directors, 27 June 1759, 386, recording correspondence from Wynch at the Cape of Good Hope, of February 1759, received by way of Copenhagen. Wynch apparently dispatched this correspondence in advance of his own departure, on two Europe-bound Danish ships that sailed on 21 February 1759. See IOR/P/D/41, Military and Secret Consultations—Madras, 26 June 1759, 300 ff (entering a copy of a letter of 23 February 1759 from Wynch at the Cape of Good Hope, in which this is reported).

[43] IOR/G/35/12, Letter from Alexander Wynch, Cape of Good Hope, to Roger Carter, 4 February 1759, folios 262v–4.

[44] IOR/P/D/41, Military and Secret Consultations—Madras, 26 June 1759, 299, entering a copy of the letter.

[45] The capture is noted in Malleson, *History of the French in India* (n 17 above) 531–2. For contemporary confirmation, see IOR/P/C/52, Select Committee Consultations—Madras, 10 August 1758, 308–9 (reports of capture by English squadron of French vessel after August engagement); *ibid* 22 August 1758, 349 (reports of retaliatory capture of a 'large Dutch ship'); *ibid* 28 August 1758, 358 (reports of the arming of the ship with 50 guns). See similarly, eg IOR/H/95, Letter from Robert Palk to Rt Hon William Pitt, 3 July 1759, folios 179, 185 (naming the ship as the *Harlem*).

(d) The Response at Fort Marlborough to Wynch's Letter

Roger Carter and the Secret Committee at Fort Marlborough knew only what Wynch's letter disclosed on its face. Even so, its brief terms were sufficient to provoke an instant response. Captain Frith, commander of the Fort Marlborough garrison, was immediately ordered to recommend a plan of defence in case of French attack.[47] A week or so later, on 22 August 1759, the Secret Committee convened to consider what should be done. The surviving minutes record its initial reaction[48]:

> It appearing from Mr Wynch's Letter that the French have entertain'd a design of surprizing this place and as it is probable that they may not have entirely dropt their Scheme, the Committee now take into Consideration what are the best measures to be pursued to prevent such a design's proving effectual, shou'd they hereafter attempt it, as well as what is necessary to be done for the security of our expected shipping.

In the ensuing meeting, a paper of instructions was drawn up and approved, containing signals etc for shipping, to be strictly observed by all commanders during their stay on the West Coast; a survey was ordered of the entrance to Bencoolen Bay, to ensure the safety of ships which, in an emergency, might need to approach close to shore; and secret instructions were drafted to the Company's residents at Fort Marlborough's out-settlements. Next, Captain Frith's preliminary plans for defence were scrutinised, and the Committee resolved to write to him, informing him of those parts that were considered necessary and practicable to be implemented. Finally, the Committee ordered the military officers to report on Fort Marlborough's military resources and the state of its fortifications, and to make recommendations for their improvement.

Two weeks later, on 7 September 1759, the Committee reconvened to consider these reports and what further action was required.[49] The officers' recommendations for the construction of batteries were accepted; however, any more ambitious plans for the building of a wall and ditch around Fort Marlborough were rejected on grounds of cost and the absence of the necessary skilled persons to conduct the work.

[46] Malleson, *History of the French in India*, (n 17 above) esp 525–31, and generally on these difficulties, ch 12.

[47] IOR/G/35/12, 'A Plan for defending Fort Marlborough if attack'd by the French', 22 August 1759, folios 269v–70v.

[48] IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 22 August 1759, folio 268.

[49] IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 7 September 1759, folios 271–2. The letter from the officers at Fort Marlborough, dated 6 September 1759, follows the minutes: *ibid* folios 274–6v.

These steps having been taken for the security of Fort Marlborough, the Secret Committee's next priority was to communicate these and other recent developments to the Court of Directors and to seek assistance with their plight. In this they were in luck. On 2 September, the *Earl of Holderness* and the *Pitt* had arrived in company at Bencoolen.[50] They were the first Europe-bound ships to arrive, and to offer a direct means of communication with the Company in London, since the departure of the *London* and the *Egmont* six months earlier.[51] The *Earl of Holderness*, one of the annual pepper boats, had to be detained for several months to gather its pepper cargo.[52] However, the *Pitt* was then Europe-bound, on its return from a path-breaking journey to China.[53]

When the *Pitt* left Bencoolen for Europe on 24 September 1759, it had two important packets of correspondence on board. Roger Carter's instructions to the *Pitt's* commander, Captain Wilson, betray their contents.[54] Packet *A* was to be forwarded by a trusty officer, with all possible dispatch, immediately on the ship's arrival at any port of Great Britain and Ireland. Packet *B* was meanwhile to remain on board until the arrival of the *Pitt* in the Thames, and be delivered as soon afterwards as convenient.[55] Both packets were always to be kept on hand, and slung with proper weights, so that in case of enemy attack during the voyage, and no probability of an escape, they might in the last extremity be thrown overboard.

The *Pitt* finally arrived safely at Kinsale, Ireland, on 23 February 1760.[56] From there, Packet *A* seems to have been immediately dispatched by express means to East India House in London, where it appears to have arrived on 1 March 1760.[57] There can be no doubt about its contents. One inclusion was a general letter, dated 21 September 1759, which was read at the Court of Directors' next meeting on 4 March 1760.[58] Arranged under the conventional headings, no one

[50] IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 2 September 1759, 273 (diary entry).

[51] IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 23 March 1759, 103 (diary entry)

[52] IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 2 September 1759, 273 (arrival of the *Earl of Holderness*); *ibid* 4 October 1759, 306 (departure for the north); *ibid* 18 December 1759, 471 (arrival from the north); IOR/G/35/12, Letter from Fort Marlborough to the Court of Directors, 5 February 1760, folio 481 ff, para 1 (sailing for Europe on 7 February 1760).

[53] See n 165 below.

[54] IOR/G/35/12, Directions from Roger Carter and Richard Preston to Captain William Wilson, Commander of the *Pitt*, 22 September 1759, folio 334.

[55] Packet *B* contained standard items of information relating to the commercial activities at Fort Marlborough (eg journals, ledgers, letters sent and received, accounts): see IOR/G/35/12, List of contents of Packet *B* sent via the *Pitt*, 21 September 1759, folio 332.

[56] IOR/L/MAR/B/525, index to the marine records for the *Pitt*.

[57] See, eg the contemporary press reports that on 1 March 1760, the Company received an account of the *Pitt*'s arrival at Kinsale: eg *London Chronicle* (1–4 March 1760) 219, col 1; *London Evening Post* (1–4 March 1760) 1, cols 1–2. The same can be inferred from the minutes, noted in n 58 below.

[58] IOR/B/75, Minutes of Meeting of Court of Directors, 4 March 1760, 637, recording the reading of a general letter from Fort Marlborough of 21 September 1759. There is no record of Carter and Preston's letter to the Secret Committee of the Court of Directors of 16 September 1759 having been read at this or subsequent meetings.

reading it in London would imagine that there was anything seriously awry. However, the same packet also contained a further, substantial body of material not intended to be made public, addressed only to the Secret Committee of the Court of Directors.[59] In the ordinary course, this secret material would not have been disclosed at the general meeting of the Court.[60] And it would have told a very different story.

The secret material sent by the *Pitt* included copies of all correspondence to and from the Secret Committee up to the time of the *Pitt*'s departure, and minutes of the Secret Committee's meetings during the same period. It therefore included a copy of Wynch's letter of 4 February 1759 and records of all of the secret deliberations that had followed its receipt on 14 August 1759. Even more critical, however, was a secret letter from Roger Carter and Richard Preston at Fort Marlborough, dated 16 September 1759. This letter assumed fundamental importance in the litigation in *Carter v Boehm*, and for good reason. No reader could doubt how seriously Wynch's letter was being treated by Roger Carter and the other Secret Committee members in September 1759, and how ill-prepared Fort Marlborough was for a French attack.

Carter and Preston's secret letter of 16 September 1759 related[61]:

> It is with much concern We are to acquaint your Honors, that by a Letter from Alexander Wynch Esq, dated at the Cape of Good Hope the 4th February last to the Deputy Governor, We are informed that your Settlements on this Coast have attracted the notice of the French, who last year, had actually a Design on foot, to attempt taking this settlement by surprize, which they purported to do with one Ship, and about Four hundred Troops.
>
> As it is very probable that the Enemy may hereafter revive their intention, though for the present We may suppose they have dropt it, We have taken the necessary precautions, as well for the Security of such Shipping as may be on the Coast at the time, as for the defence of the Settlement.

There followed an exhaustive account of the steps that had been taken, to counter any French threat. Carter and Preston painted a bleak picture. Steps had been taken which would 'at least render it a very difficult matter to surprize [the place]'. Thus, look-out houses and guards had been established at suitable sites on the coast, with instructions for signals to be made on sighting shipping; and entrenchments were being made at the places where there was any likelihood of the enemy's attempting to land.[62] However, should the enemy land, and be too strong in the field, there would be no option but to retreat into the country, which it was hoped would prove too dangerous for any French force

[59] The contents of the secret packet dispatched on the *Pitt* are confirmed by the list of contents of the duplicate secret packet subsequently dispatched on the *Earl of Holderness* to the Secret Committee of the Court of Directors, dated 31 December 1759: IOR/G/35/12, folio 409.

[60] See further n 168 below.

[61] IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, paras 10–11.

[62] *Ibid* para 12.

to follow.[63] To retire to Fort Marlborough and attempt to defend the place would mean the 'absolute loss of everything'.[64] The military stores were too poor, and the Fort itself too weak, to make any such defence practicable. The gunpowder was largely bad, stocks of small arms were low, and there were no large guns to place on the entrenchments raised to defend the approaches to Fort Marlborough.[65] Furthermore, whilst the military officers had recommended ways of making the defences at Fort Marlborough tenable against a European enemy, no steps could sensibly be taken in that direction.[66] There were no skilled persons at Fort Marlborough capable of properly directing and completing the works, and it was thought better to wait for the long-awaited arrival of expert assistance from Fort St George or Bombay than to spend a very considerable sum on works that might be found wanting.[67] Carter and Preston concluded with a final, uncertain plea for assistance[68]:

> We must leave to your Honors consideration, how far the present increase of your Investment, & the favourable prospect which your Settlements on this Coast in general bear, may render it worthy of your attention to increase our Works & Means of Defence; at least, so as to make our Enemies not think us so very easy a Conquest, as by the force they purposed to send against us, We may at present suppose they do.

Other correspondence no doubt remained onboard the *Pitt*, consistently with Captain Wilson's instructions, until the *Pitt*'s arrival in the Thames in mid-April. Amongst that correspondence was one final, crucial letter. This was a private letter from Roger Carter to his brother, dated 22 September 1759, in which he instructed his brother to take out insurance on his behalf in London, against the risk of a European enemy attack on Fort Marlborough. Acting on these instructions, on 9 May 1760, his brother effected the policy that was to trigger the litigation in *Carter v Boehm*.

3. The Origins of the Attack on Fort Marlborough: D'Estaing's Expedition

It is clear that in September 1759, when Roger Carter's insurance instructions were dispatched to London, there was a substantially heightened fear of a French attack on Fort Marlborough. The direct cause of this fear, and the reason for Carter's insurance instructions, was the letter which had arrived from Wynch in the middle of the previous month. Just over six months later, the feared attack came. However, it did not come from the source that Wynch's letter had given Carter cause to fear: viz, the French fleet gathered at the Cape over

[63] IOR/G/35/12 (n 61 above) para 18.
[64] IOR/G/35/12 (n 61 above) para 18.
[65] IOR/G/35/12 (n 61 above) para 13.
[66] IOR/G/35/12 (n 61 above) para 17.
[67] IOR/G/35/12 (n 61 above) para 17.
[68] IOR/G/35/12 (n 61 above) para 19.

the winter of 1758–59.[69] Rather, it was the product of the opportunism of one man: the Count D'Estaing.[70]

D'Estaing, a career soldier, had arrived in India in April 1758, at the head of the battalion of the Lorraine regiment that had left France with Lally in May 1757.[71] He was immediately involved in all of the major early actions,[72] but that involvement was to be short-lived. On 13 December 1758, one day into the siege of Fort St George, D'Estaing was taken prisoner in Madras's Black Town.[73] Over the ensuing weeks, and particularly once the siege ended, the two sides negotiated for his release by some suitable exchange for English prisoners in India.[74] No mutually acceptable terms were found. By early May 1759, Governor Pigot at Fort St George had determined that the best course was for D'Estaing to proceed to Europe, on his parole of honour, to be exchanged there.[75]

D'Estaing left Pondicherry for Mauritius in May 1759, ostensibly Europe-bound. However, D'Estaing was a man of action, and it seems unlikely that he ever had any real intention of returning to Europe, as his English captors, and his parole, required. Whilst at Pondicherry, he had presented Lally with plans for a sea expedition to Bengal, and for a further expedition against the kingdom of Cochinchine and in the Philippines.[76] The demands of the conflict in India ultimately prevented these being put into effect, but D'Estaing's efforts continued on his arrival at Mauritius. He immediately approached the French Governor there, Monsieur de Magon, with plans for an ambitious privateering expedition to the China Seas.[77] Magon eventually agreed. D'Estaing was given the use of two armed Company vessels, the *Condé* and the *Expedition*.[78]

D'Estaing's expedition left Mauritius on 1 September 1759, before the return of the French fleet from the Coromandel Coast. Their subsequent course appears to have been determined more by opportunism than by careful planning.[79] They spent the autumn months in the Persian Gulf, where they captured two significant prizes, as well as the East India Company's factory at Gambroon.

[69] On this, see further 104–6 below.
[70] The most substantial modern biography of D'Estaing is the French language work of J Michel, *La vie aventureuse et mouvementée de Charles-Henri comte d'Estaing* (Verdun, Michel, 1976). The only sustained English language discussion of D'Estaing's privateering expedition appears to be P Crowhurst, *The Defence of British Trade* (Folkestone, Dawson, 1977) 237–40 and 'D'Estaing's Cruise in the Indian Ocean: A Landmark in Privateering Voyages' (1972) 35 *Studia* 53.
[71] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 27–34.
[72] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 35–40.
[73] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 39–40. It is suggested that D'Estaing had approached a group of soldiers in Madras's Black Town, but discovered too late that they were English troops. Turning his horse to flee, he fell and was captured: Malleson, *History of the French in India* (n 17 above) 537–8; Davison Love, *Vestiges of Old Madras* (n 34 above) vol 2, 555–6.
[74] The negotiations emerge from the deliberations of the Madras Military and Secret Committee: IOR/P/D/41, Military and Secret Consultations—Madras, 23 February 1759, 16; *ibid* 29 March 1759, 95–7; *ibid* 16 April 1759, 118–20; *ibid* 3 May 1759, 155–6.
[75] IOR/P/D/41, Military and Secret Consultations—Madras, 3 May 1759, 155.
[76] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 43–4.
[77] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 44.
[78] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 45–6, 48.
[79] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 46–51.

Thereafter, in November, the ships began their journey eastwards for the straits that provided the doors into the China Seas. This journey proved unexpectedly difficult, and on 4 February 1760, when D'Estaing's expedition reached Ayer Bungis, a small Dutch settlement to the north of the West Coast of Sumatra, his men were in no state to undertake an ambitious sea expedition into the China Seas.[80] D'Estaing's attention therefore turned to more immediate targets: the English Company's interests on the West Coast. The Company's northern-most out-settlements of Natal and Tapanouly fell in quick succession. Following a short stay at the Dutch settlement at Padang in March, D'Estaing's expedition then set sail southwards for Fort Marlborough. On 31 March 1760, the French ships were sighted off Bencoolen. By 3 April, the inevitable had happened. Roger Carter and the Company's servants at Fort Marlborough had surrendered. The Company's remaining out-settlements on the West Coast fell into French hands over the ensuing weeks.

At Fort Marlborough, Roger Carter and the rest had had no hint of this impending storm until 20 February 1760, when a letter arrived from Richard Wyatt, the Resident at the northern out-settlement of Natal, reporting the arrival of the two French ships on 6 February 1760.[81]

> I wrote you this morning (by a Boat which sailed immediately) that I had advice by Noquedah Lebbee, that two large French ships were at Ayer Bungy, and had sailed from thence for this Place, and were then in sight from the Hill . . . They are now both come in sight, but show no Colours, and are in cha[s]e of the Sloop Resolution, which was dispatched this morning, and they seem to gain on her, but night coming on may favour her escape . . . I have this morning sent an Express to Tapanooly, to put Mr Nairne on his Guard.

It was a very rude awakening. News of D'Estaing's earlier raids in the Persian Gulf had certainly reached the Company's servants at Bombay in late October 1759,[82] and at Madras by January 1760.[83] However, no one at those places appears to have suspected that D'Estaing's next stop might be Sumatra. Unaware of these developing events further afield, public and private business at Fort Marlborough appears to have resumed its normal pattern after the *Pitt*'s departure in late September 1759. Indeed, by early 1760 at least, Roger Carter might have been forgiven for feeling secure. 12 months after Wynch's letter arrived from the Cape, no French force had appeared; news, such as Carter had, was of English successes in India; and the most recent intelligence of the French

[80] Michel, *Charles-Henri comte d'Estaing* (n 70 above) 46–51.

[81] IOR/G/35/12, Letter from Richard Wyatt, Natal, to the Secret Committee, Fort Marlborough, 6 February 1760, 6pm, folio 492.

[82] IOR/P/D/43, Military and Secret Consultations—Madras, 11 February 1760, 155–7, where a letter from Bombay, dated 26 December 1759, is entered, reporting receipt of the first intelligence around the end of October.

[83] IOR/P/D/43, Military and Secret Consultations—Madras, 14 January 1760, 62; *ibid* 11 February 1760, 157–61.

fleet suggested that it was out of harm's way, sheltering at Mauritius for the winter months.[84]

C. CARTER'S INSURANCE POLICY

Having set *Carter v Boehm* in its wider historical context, we are better placed to understand Boehm's allegations of non-disclosure, and the court's response to them. Before turning to this, however, more must be said about Carter's insurance policy. The origin of Carter's instructions should now be clear. Less easy to perceive clearly today, and relatively easy to misperceive, are the purpose and form of the policy that was effected in London on 9 May 1760.

1. The Purpose of Carter's Policy

If Fort Marlborough were to fall to a European enemy, then Deputy Governor Carter might lose his position at Fort Marlborough and his associated salary.[85] However, that consideration cannot explain the policy effected on his instructions in May 1760. The £10,000 sum insured[86] was over 30 times Carter's annual wage as Deputy Governor.[87] The four percent premium[88] alone was equal to more than one year's salary, and there is evidence that he was prepared to pay very substantially more.[89] In September 1759, Carter remitted £600 to his brother Thomas in London, via certificates drawn on the Company, sent on board the *Pitt*.[90] A further £1,750 was remitted in early February 1760, via certificates sent on board the *Earl of Holderness*.[91]

[84] IOR/G/35/12, Letter from the Secret Committee, Fort St George to the Secret Committee, Fort Marlborough, 7 November 1759, folio 353; IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 20 December 1759, folio 399 (considering the letter).

[85] In fact, after Fort Marlborough's fall in April 1760, Roger Carter made his way with the other West Coast prisoners to Madras, in accordance with the terms of their paroles of honour. During his stay there, and until he finally resumed his position at Fort Marlborough in September 1762, he and the other West Coast servants were paid their usual salary by the Company's government at the Presidency of Fort St George, Madras: see esp IOR/P/240/19, Public Consultations—Madras, 30 September 1760, 453. In the interim, Fort Marlborough had been elevated to the status of an independent Company Presidency, headed by a 'Governor', rather than a 'Deputy Governor'.

[86] *Carter* (n 1 above) 3 Burr 1905, 1907; 97 ER 1162, 1163.

[87] The annual salary for the Deputy Governor had been £200 for many years, but Carter appears to have been allowed an extra £100: see, eg IOR/G/35/12, Letter from Roger Carter to the Court of Directors, 10 March 1759, folios 65, 70.

[88] *Carter* (n 1 above) 1 Black W 593, 593; 96 ER 342, 343.

[89] See too the further passage from the insurance instructions, noted by Lord Mansfield, indicating that in the event of a Dutch War, Carter would wish to have insurance at any rate: *Carter* (n 1 above) 3 Burr 1905, 1908n; 97 ER 1162, 1168n.

[90] IOR/G/35/12, Letter from Fort Marlborough to the Court of Directors, 21 September 1759, folios 302–31, with certificates listed at folio 331.

[91] IOR/G/35/12, Letter from Fort Marlborough to the Court of Directors, 31 December 1759, folios 411–29, with certificates listed at folio 429. The records show that remittances on this scale were wholly unprecedented for Roger Carter. They were also unusual for Company servants

Carter's policy is ultimately comprehensible only in light of his double life as a Company-covenanted servant. What he principally feared was the loss of the merchandise and/or treasure at Fort Marlborough that formed the subject-matter of his private trading activities within the East Indies.[92] A contemporary later described Carter as a man 'conspicuous for his abilities in trade, & in the management of [the West Coast] Government'[93]; and in the period that immediately followed his return to the West Coast as Deputy Governor in May 1758, Carter's private trading activities seem to have been extensive. Indeed, by late 1759, some junior Company servants were complaining that Carter was monopolising the country-trade at their expense. To quote one: '[o]ur Governour Mr Carter will carry all the trade at Marlbro, and nobody can do anything worthwhile'.[94] Similar accusations embittered Carter's eventual resignation from the Governorship at Fort Marlborough in 1767.[95] Whether or not these accusations were justified, the substantial scale of Carter's trading activities immediately prior to the French assault on Fort Marlborough is indicated by the uncontradicted evidence of a witness in the litigation in *Carter v Boehm* that on 8 February 1760,

> [Carter] bought . . . goods to the value of 4000 l, and had goods to the value of above 20,000 l and then dealt for 50,000 l and upwards.[96]

Against this background, it is reasonable to assume that when Carter sent his insurance instructions to his brother by the *Pitt* in September 1759, the policy he sought was to be a bona fide hedge against the inevitable injury to his private trading interests if the feared French attack on Fort Marlborough should come. This seems to be put beyond doubt by a note to Burrows' report, which records that Carter wrote to his brother that he was

> 'now more afraid than formerly, that the French should attack and take the settlement' . . . And therefore he desire[d] to get an insurance made upon his stock there.[97]

generally, except as a way of remitting their fortunes to England in advance of their impending departure from the East Indies.

[92] On the double lives of East India Company covenanted servants, see 61 above.

[93] British Library, Private Papers, MS Eur D737/1, Letter from Hew Steuart to his sister, 10 February 1766.

[94] Nottinghamshire Archives, Private Papers, DD/N/203c/21, Letter from Stokeham Donstan to George Donstan, 12 December 1759; see too DD/N/203c/20, Letter from Stokeham Donstan to George Donstan, 15 March 1759.

[95] IOR/G/35/75, Diary and Public Consultations—Fort Marlborough, 80 ff (letter from Roger Carter of 31 January 1767 entered); IOR/G/35/75, Diary and Public Consultations—Fort Marlborough, 159 ff (letter from Roger Carter of 25 May 1767 entered, giving an account of his private trading activities from 1762–65, in his defence against such accusations).

[96] See *Carter* (n 1 above) 3 Burr 1905, 1913; 97 ER 1162, 1164. See too private correspondence between Roger Carter and the Company, in which he claimed to have had a private cargo worth £3,000 on board the *Denham* East Indiaman, which was deliberately sunk in the waters off Bencoolen shortly before D'Estaing's assault on Fort Marlborough: IOR/G/35/12, Letter from Roger Carter, Fort St George, to the Court of Directors, 28 October 1760, folio 559 ff, paras 3–5.

[97] *Carter* (n 1 above) 3 Burr 1905, 1913n; 97 ER 1162, 1166n.

2. The Form of Carter's Policy

As Carter's policy has not been found, its form must be inferred from the incomplete details revealed in the case-reports. These are sufficient to suggest an important disjunction between Carter's purpose and the policy's form, which calls for explanation. As reported, Carter's policy was not an ordinary indemnity insurance policy. It did not entitle Carter to an indemnity only in so far as his stock-in-trade at Fort Marlborough was shown to have been lost in a European enemy assault. It involved a different bargain, whereby the whole insured sum of £10,000[98] would be payable if Fort Marlborough was lost to a European enemy[99] within 12 months of October 1759,[100] without inquiry into whether or to what extent Carter had any interest at stake. Central to this analysis are the policy terms 'interest or no interest'[101] and 'without the benefit of salvage'.[102]

In 1760, a policy in these terms would have been comprehensible as a wagering policy. At that time, wagers were prima facie valid and enforceable at common law. So, too, were wagers in the form of insurance policies.[103] Difficulties nevertheless arose if such instruments were used by wagering parties, because the courts tended to construe insurance policies on property as contracts of indemnity. This brought a series of inconvenient corollaries for wagering parties, who meant to play only for the whole insured sum, irrespective of the existence and extent of any real loss to the party 'insured'. To avoid this construction and its corollaries, various forms of words came to be inserted into policies of this nature, which reaffirmed their character as wagers. Typical in wagering policies insuring property against marine risks were the terms found in Carter's policy: 'interest or no interest', 'free from average', and 'without benefit of salvage'.[104] Marshall explained their role as follows[105]:

[98] *Carter* (n 1 above) 3 Burr 1905, 1907; 97 ER 1162, 1163.

[99] *Carter* (n 1 above) 1 Black W 593, 594; 96 ER 342, 343; (1766) 3 Burr 1905, 1907, 1908, 1911, 1912 and 1915–16; 97 ER 1162, 1163, 1165, and 1167–8. The precise definition of the insured-against event is considered at 90–93 below.

[100] The commencement date is inconsistently reported as either 1 or 16 October: *Carter* (n 1 above) 3 Burr 1905, 1906 and 1911; 97 ER 1162, 1163 and 1165; (1766) 1 Black W 593, 594; 96 ER 342, 343.

[101] *Carter* (n 1 above) 3 Burr 1905, 97 ER 1162; (1766) 1 Black W 593, 96 ER 342, 343 (where these terms are noted).

[102] *Carter* (n 1 above) 3 Burr 1905, 97 ER 1162 (where these terms are noted).

[103] See the early discussions of wagering policies in, eg JA Park, *A System of the Law of Marine Insurance*, 4th edn (London, J Butterworth, 1800) ch 14, esp 259–60; S Marshall, *A Treatise on the Law of Insurance*, 2nd edn (London, J Butterworth, 1808) vol 1, 119–42, esp 122–6; J Arnould, *A Treatise on the Law of Marine Insurance and Average* (London, W Benning & Co, 1848) § 116. A comprehensive legislative attempt to tackle wagers in the form of insurance policies came with the Life Assurance Act 1774; ordinary wagers were tackled by the Gaming Act 1845. For discussion, see Warren Swain's chapter in this volume.

[104] Marshall, *A Treatise on the Law of Insurance* (n 103 above) vol 1, 119–21, 122–3; similarly, Arnould, *A Treatise on the Law of Marine Insurance and Average* (n 103) vol 1, §§ 16 and 116.

[105] Marshall, *A Treatise on the Law of Insurance* (n 103 above) vol 1, 121; similarly, Arnould, *A Treatise on the Law of Marine Insurance and Average* (n 103) § 116.

> [A wagering policy] is usually conceived in the terms, '*interest or no interest*', or '*without further proof of interest than the policy*,' to preclude all enquiry into the interest of the insured. And, as a consequence of the insured's having no interest in the pretended subject of the policy, it follows that the insurer cannot be liable for any partial loss. A partial loss is not an event sufficiently defined and precise to be the criterion of a wager; and nothing but that sort of misfortune which is considered as amounting to a total loss can decide it. The parties mean to play for the whole stake; and when the underwriter pays a loss, he cannot, as in the case of an insurance upon interest, claim any benefit from what may have been saved; and to preclude all claim of that sort, the words, '*free of average, and without benefit of salvage*,'[106] are always introduced into wager policies.

In 1745, Parliament intervened to tackle the mischiefs presented by policies of this nature, in a limited sphere.[107] Policies on British vessels and cargoes, expressed in these terms, were declared void.[108] Beyond this, the common law was left unaffected for another three decades. Thus, in the absence of some specific public policy objection to the particular wager, a wager taking the form of an insurance policy on 'interest or no interest' terms would be valid and enforceable at common law.

Carter was not, of course, a true 'wagering' party. He sought the policy as a bona fide hedge against the risk of the loss of his valuable stock-in-trade at Fort Marlborough in a European enemy assault. If his policy nevertheless took the form of an 'interest or no interest' policy on Fort Marlborough, another explanation must be found. It seems likely to be practical. The best explanation is that Carter would have faced considerable difficulty in proving, to the satisfaction of an underwriter and/or a court in London, that he had owned stock at Fort Marlborough at the time of the enemy's attack, its value, and the extent to which it was lost.[109] Probative difficulties of this type underlay the introduction

[106] The phrase 'without benefit of salvage' would now be understood as precluding what modern marine insurance lawyers would understand as two separate rights: the insurer's right, on indemnifying his insured for an actual or constructive total loss, to acquire whatever remains of the insured subject-matter (the 'salvage'), under the doctrine of abandonment; and the insurer's right, on indemnifying his insured, to acquire his insured's subsisting rights of action against third parties, under the doctrine of subrogation. Both rights can be understood as necessary incidents of an indemnity insurance contract, operating to prevent the insured from profiting by obtaining more than a full indemnity for his loss. The latter right originated as an incident of the former during the 18th century, and the two doctrines remained imperfectly distinguished until *Simpson & Co v Thomson* (1877) 3 App Cas 279. See C Mitchell and S Watterson, *Subrogation: Law and Practice* (Oxford, Oxford University Press, 2007) ch 10(B).

[107] 19 Geo II c 37.

[108] 19 Geo II c 37, s 1. For contemporary discussion, see Park, *A System of the Law of Marine Insurance* (n 103 above) ch 14; Marshall, *A Treatise on the Law of Insurance* (n 103 above) 126–9.

[109] A subsidiary factor, supporting the same conclusion, might have been a desire not to publicise the character of Carter's stock-in-trade. Cf the preamble to 19 Geo II c 37, indicating that one concern underlying the legislation was that 'interest or no interest' policies provided a cloak beneath which parties could undertake prohibited trade. A further subsidiary factor might have been uncertainty about the legal position if some of the stock was held by Carter for sale on commission rather than on his own account. For evidence of such activity, see Lincolnshire Archives, Redbourne Hall deposit, Ledger, 2 Red 4/4/10, loose item (f) (counsel's opinion on a claim by a party for whom Roger Carter was commission agent at the time of the French attack).

of 'interest or no interest' terms into what were originally bona fide insurance policies.[110] And Lord Mansfield himself was later to suggest that the difficulty of bringing witnesses from abroad to prove an insured's interest was the reason for the exclusion of foreign ships and cargos from the 1745 Act,[111] which rendered void marine policies on 'interest or no interest' terms.[112]

D. LORD MANSFIELD'S JUDGMENT

Having clarified the historical background to Carter's insurance claim, we are better placed to re-consider Lord Mansfield's judgment in *Carter v Boehm*.[113] Three aspects of this require examination[114]: Lord Mansfield's seminal statement of the disclosure obligations of parties to insurance contracts, with which he began his judgment; his subsequent findings regarding the context in which the policy was effected, and the policy's true construction; and finally, his treatment of Boehm's defences to liability. The theme that consistently emerges is that *Carter v Boehm* was absolutely not a 'pro-insurer' decision. Every argument advanced by Boehm failed. This might perhaps be explained by the inherent weakness of his case, exacerbated by the court's indisposition to find for a man suspected of misconduct.[115] But this would be to miss the decision's real significance. Lord Mansfield's seminal statement of the law was primarily important for its emphatic recognition that there were limits to an insurer's ability to avoid liability for non-disclosure by his insured. Boehm's case was a weak case only because of those limits, and because of the court's inclination to apply them robustly to the case at hand.

1. The Law of Non-disclosure

Whatever might be the case today, *Carter v Boehm*'s landmark status in 1766, and in the decades that immediately followed, stemmed from Lord Mansfield's

[110] See eg Marshall, *A Treatise on the Law of Insurance* (n 103 above) vol 1, 122.

[111] 19 Geo II c 37, s 1.

[112] *Thellusson v Fletcher* (1780) 1 Doug 315 316; 99 ER 203.

[113] Burrows' report indicates that Carter's insurance policy came before Lord Mansfield on more than one occasion: see (1766) 3 Burr 1905, 1906–7 and 1911–13; 97 ER 1162, 1163 and 1165–6. Two common law actions on the policy came before Lord Mansfield and a special jury at Guildhall in 1762, concluding in a verdict for the insured. There was then a protracted period of litigation in equity, in which the underwriters sought to obtain further evidence to assist their case: *Carter* (n 1 above) 3 Burr 1905, 1912; 97 ER 1162, 1166. This finally led to a further trial before Lord Mansfield and a special jury at Guildhall, again concluding in a jury verdict for the insured. The reported 1766 decision of the Court of King's Bench was a decision on a motion for a retrial: see n 1 above. There are clear hints that Lord Mansfield was influenced by the fact that the underwriters' protracted inquiries had produced very little in support of their case.

[114] These substantially correspond to the three stages in which Lord Mansfield himself progressed through the issues, as indicated at *Carter* (n 1 above) 3 Burr 1905, 1909; 97 ER 1162, 1164.

[115] See section I below.

preliminary exposition of the Common law principles governing disclosure between insured and insurer. Prior to Lord Mansfield's rise to the King's Bench in 1756, there was a remarkable dearth of reported cases on the law of insurance, and the few reports that existed were of very poor quality. Hence *Carter v Boehm* was significant primarily for Lord Mansfield's unprecedented attempt to set out the Common law rules, more or less comprehensively, and in a manner that provided unequivocal guidance to insureds, insurers, and their counsel.[116]

It is nevertheless important to be clear about what it was about the substance of Lord Mansfield's exposition that was truly noteworthy in 1766. His exposition had three essential elements. The first was his emphatic statement that an insurance policy might be avoided where the insurer was induced to underwrite the policy by the insured's failure to disclose a material fact, even where the insured had no fraudulent intention.[117] However important, it is reasonably clear that *Carter v Boehm* was not the origin of this principle. Both the argument in the case, and the handful of earlier cases found in the reports and contemporary treatises,[118] suggest that it was already an accepted proposition, in Equity[119] and at Common law.[120] Properly understood, it is the other two essential elements of Lord Mansfield's statements that must be regarded as remarkable: viz, his explanation of the law's normative basis, and of the circumstances in which an insurer could not avoid liability for non-disclosure by his insured.

Lord Mansfield's account of the law's normative basis will probably be familiar even to modern insurance lawyers. In simple terms, an insured's obligations were the product of a mutual requirement of pre-contractual good faith, applied to the special character of insurance contracts. The 'governing principle' 'applicable to all contracts and dealings', Lord Mansfield explained, was that

[116] See esp the preliminary exposition in JA Park, *A System of the Law of Marine Insurances* (London, J Butterworth, 1787) for a useful account of the development of the law (including the reasons for its underdevelopment prior to Lord Mansfield's rise to the King's Bench). See too the summary account, relying heavily on Park, in J Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill, University of North Carolina Press, 2004) 124–30.

[117] *Carter* (n 1 above) 3 Burr 1905, 1909–10; 97 ER 1162, 1164–5.

[118] A number of otherwise unreported cases are summarised in J Weskett, *A Complete Digest of the Theory, Laws and Practice of Insurance* (London, Frys Couchman & Collier, 1781); and Park, *A System of the Law of Marine Insurances* (n 116 above). A useful overview of the law's sources, and of the sparse 17th and 18th century English literature, is found in S Marshall, *A Treatise on the Law of Insurance* (n 103 above) ch 1.

[119] *De Costa v Scandret* (1723) 2 P Wms 169, 24 ER 686.

[120] *Anonymous* (c 1693) Skin 327, 90 ER 146; *Seaman v Fonnereau* (c 1740) 2 Strange 1183, 93 ER 1115; *Roberts v Fonereau* (1742) (noted in Park, *A System of the Law of Marine Insurances* (n 116 above) 176); *Rookes v Thurmond* (1743) (noted in Weskett, *Theory, Laws and Practice of Insurance* (n 118 above) 114–15); *Green v Bowden* (1759) (noted in Weskett, *Theory, Laws and Practice of Insurance* (n 118 above) 115–8); *Williams v Touchet* (1759) (noted in Weskett, *Theory, Laws and Practice of Insurance* (n 118 above) 118); *Ross v Bradshaw* (1761) 1 Black W 312, 96 ER 175; *Wilson v Ducket* (1762) 3 Burr 1361, 97 ER 874; *Hodgson v Richardson* (1764) 1 Black W 463, 96 ER 268. The brief reports, coupled with the ambiguity of the language of 'fraud' in this context, can make the court's exact conclusions regarding the insured's state of mind difficult to discern with certainty.

> [g]ood faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.[121]

This principle had particular resonance in the field of insurance contracts, 'contract[s] upon speculation', for the responsibilities of insureds. It was characteristic of such transactions that many facts necessary to a proper calculation of the risk being undertaken by the insurer lay peculiarly within the insured's private knowledge.[122] An insurer characteristically relied, and must be entitled to rely, on the insured's having disclosed and fairly represented such matters.[123] If the insured did not disclose them, whether by accident, negligence or fraud, and the insurer was induced by his ignorance to contract under a misapprehension as to the nature of the risk being run, the insurer could deny liability.[124]

The full significance of this explanation will be missed unless it is viewed within the entire framework of principle that Lord Mansfield articulates, and in light of the actual decision in *Carter v Boehm*. It is strongly arguable that Lord Mansfield was concerned to explain why an insurance contract might be avoided for material non-disclosure principally in order to show how, and why, there had to be limits to an insurer's entitlement to avoid liability. What Lord Mansfield had identified was ultimately a limited rationale, turning on the existence of an inequality of accessible information bearing on the contract's subject-matter, the risk undertaken, which rendered the insurer dependent on disclosure by his prospective insured. In the ensuing paragraphs of his judgment, Lord Mansfield proceeded to offer an unprecedented list of the circumstances in which an insurer could not legitimately complain of non-disclosure,[125] almost all of which can be deduced from that limited rationale. It was the emphatic recognition and application of those limits in *Carter v Boehm* that really marked the case out in 1766, and provides the primary reason why the case deserves to be remembered today.

One such limit was explicit in Lord Mansfield's initial formulation of the insured's obligations. In the absence of proof of fraudulent intention, an insurer could only avoid liability if the non-disclosure was shown to be 'material' to the risk undertaken. For many years after *Carter v Boehm*, English law's standard of 'materiality' remained remarkably under-analysed. An objective standard, involving an inquiry into the influence which the concealed matter would have had on a prudent or reasonable underwriter, was not authoritatively confirmed

[121] *Carter* (n 1 above) 3 Burr 1905, 1910; 97 ER 1162, 1164. There are earlier traces of this assumption in *Hodgson v Richardson* (1764) 1 Black W 463, 465; 96 ER 268, 269 (Yates J): 'The concealment of material circumstances vitiates all contracts, upon the principles of natural law. A man, if kept ignorant of any material ingredient, may safely say that it is not his contract'.

[122] *Carter* (n 1 above) 3 Burr 1905, 1909; 97 ER 1162, 1164.

[123] *Carter* (n 1 above) 3 Burr 1905, 1909; 97 ER 1162, 1164.

[124] *Carter* (n 1 above) 3 Burr 1905, 1909; 97 ER 1162, 1164.

[125] None of the cases cited in n 120 above provides any hints as to these limits, and subsequent textbook treatments, noted at 82–4 below, indicate that *Carter v Boehm* offered the first reported statements in this regard.

until late in the 19th century[126]; and it was more than another century before the House of Lords authoritatively clarified the required standard of influence.[127] However, a close reading of Lord Mansfield's express words, together with the actual decision in *Carter v Boehm*, suggests that Lord Mansfield may have contemplated a relatively demanding objective 'different risk' standard. Any non-disclosure would have to vary the risk undertaken, in the mind of a reasonable underwriter.[128]

The greater part of Lord Mansfield's statement of principle was concerned to elaborate a number of additional circumstances in which an insurer could make no complaint of non-disclosure by his insured. Reported by Burrows in somewhat tortuous terms,[129] the passages can be distilled into the following major propositions. An insurer could not complain of non-disclosure of any matter he knew, by whatever means, or ought to have known; nor of any matter in relation to which he had waived disclosure, or had assumed the burden of inquiry. He could not complain of non-disclosure of matters of general public notoriety; nor of matters that an underwriter in the ordinary conduct of his business could be expected to know or inform himself of. He was required to make his own independent assessment of the risk undertaken, and so could not expect to be informed of the insured's own apprehensions or speculations. And he could not complain of the insured's failure to disclose matters that would lessen the risk undertaken.

Neither the reports of *Carter v Boehm*, nor contemporary treatises, provide any insights into the origins of these important passages. In particular, it is unclear whether they reflected what would have been matters of general agreement in the mercantile world, in England or elsewhere, or whether they reflected a true creative leap on Lord Mansfield's part.

Whatever the correct explanation may be, Lord Mansfield's statements in *Carter v Boehm* were to have a remarkably enduring status.[130] In the decades that immediately followed, they were to provide the backbone of the accounts

[126] See *Ionides v Pender* (1874) LR 9 QB 531; *Rivaz v Gerussi* (1880) 6 QBD 222. There are traces of an objective approach of this character in very much earlier cases: eg *Durrell v Bederley* (1815) Holt 283, 286; 171 ER 244, 245 (Gibb CJ) (direction to jury); *Reid & Co v Harvey* (1816) 4 Dow PC 97, 106; 3 ER 1102, 1105 (counsel's argument).

[127] *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL).

[128] See esp Lord Mansfield's language in *Carter* (n 1 above) 3 Burr 1905, 1909, 1911; 97 ER 1162, 1164 and 1165 (which is most consistent with a 'different risk' analysis) and his treatment of the materiality of Wynch's letter, discussed at 100–4 below (which manifests an objective judgment regarding its significance). Cf too Lord Mansfield's robust rejection of the relevance of the broker's evidence regarding how the actual insurer would have responded to the facts not disclosed (which could not be strong evidence, given the uniqueness of the case, of reasonable *market* practice): *Carter* (n 1 above) 3 Burr 1905, 1918; 97 ER 1162, 1168–9.

[129] See *Carter* (n 1 above) 3 Burr 1905, 1910–11; 97 ER 1162, 1164–5.

[130] For subsequent decisions by Lord Mansfield himself that appear to involve the limits articulated in *Carter v Boehm*, see *Planche v Fletcher* (1779) 1 Doug 251, 99 ER 164 (matters of common notoriety); *Court v Martineau* (1782) 3 Doug 161, 99 ER 591 (waiver of disclosure); *Mayne v Walter* (1782) noted in Park, *A System of the Law of Marine Insurances* (n 116 above) 195–6 (waiver of disclosure). These tend to suggest a general disposition, consistent with the resolution of *Carter v Boehm*, to interpret and apply the limits in a robust manner, in favour of honest insureds.

in leading treatises. When Park's *A System of the Law of Marine Insurance* first appeared in 1787,[131] Lord Mansfield's entire judgment was reproduced, in laudatory terms[132]:

> To have given this very elaborate and learned argument in the state in which it was delivered, certainly requires no apology; because from it may be collected all the general principles, upon which the doctrine of concealments, in matters of insurance, is founded, as well as all the exceptions, which can be made to the generality of those principles. To have abridged such an argument, would have very much lessened the pleasure of the reader, and would have been an injury to the venerable judge, who in that form delivered the opinion of the court.

Carter v Boehm subsequently received more critical treatment in Marshall's *Treatise on the Law of Insurance*,[133] which first appeared in 1802. Quoting Lord Mansfield's judgment in full at the end of his chapter on 'Concealment',[134] Marshall expressed strong reservations about the decision.[135] He was nevertheless forced to admit that the principles stated by Lord Mansfield were 'in general, abstract propositions of indisputable truth, and [were] laid down with admirable clearness and precision'.[136] Consistently with this, Marshall's discussion of 'what things need not be disclosed' was substantially a verbatim copy of the exceptions articulated by Lord Mansfield in *Carter v Boehm*, with the addition of a further exception, reflected in other decisions of Lord Mansfield, for matters falling within an express or implied warranty.[137]

When Marshall first wrote, he was able to quote no more than a handful of decisions, apart from *Carter v Boehm*, in exemplification of 'what things need not be disclosed'.[138] Over the 19th century, a growing number of reported cases

[131] Park, *A System of the Law of Marine Insurance* (n 116 above) ch 10, esp 183–93.

[132] Park, *A System of the Law of Marine Insurance* (n 116 above) 193. *Carter v Boehm* is the earliest authority cited for the proposition that there may be cases where a policy will not be avoided by non-disclosure. Park continues by citing a handful of later cases, remarking that '[t]he rules, then advanced and illustrated, have since been confirmed by the opinion of the judges upon similar questions': *ibid* 193. This text's manner of presentation continued into the 8th edition: F Hildyard (ed), *Park—A System of the Law of Marine Insurances*, 8th edn (London, Saunders & Benning, 1842) vol 1, ch 10.

[133] Marshall, *A Treatise on the Law of Insurance* (n 103 above).

[134] Marshall, *A Treatise on the Law of Insurance* (n 103 above) ch 11.

[135] Marshall, *A Treatise on the Law of Insurance* (n 103 above) 483–4, considering that the result was not 'warranted even by the principles which his lordship lays down as the basis of it'. Marshall's quotation of Lord Mansfield's judgment is annotated with footnotes, expressing doubts about a number of its factual assumptions/findings, and about Lord Mansfield's application of the principles he had stated. However, Marshall also thought that the policy should have been void on public policy grounds, because it necessarily placed the insured in a position of conflicting duties: *ibid* 484, and see 96–7 below.

[136] Marshall, *A Treatise on the Law of Insurance* (n 103 above) 484 fn.

[137] *Haywood v Rodgers* (1804) 4 East 590, 102 ER 957 (foreshadowed by Lord Mansfield's decision in *Shoolbred v Nutt* (1782), noted in Park, *A System of the Law of Marine Insurance* (n 116 above) 229a). Only two other cases are noted in the 2nd edition's (14 page) section: *ibid* 473–86.

[138] Marshall, *A Treatise on the Law of Insurance* (n 103) ch 11, 473–84. This text's manner of presentation continued into the 5th edition: see W Shee (ed), *Marshall—A Treatise on the Law of Marine Insurance*, 5th edn (London, Shaw & Sons, 1865) ch 11.

developed under this head, but really did little more than explore the implications of the principles stated by Lord Mansfield in *Carter v Boehm*, on particular facts. Unsurprisingly, there are few reported cases in which an insurer failed because he knew the fact allegedly concealed.[139] Equally unsurprisingly, rather more cases clustered around the principles that an insurer cannot complain of non-disclosure of matters of common notoriety, or of what the insurer can reasonably be expected to know or inform himself, in the ordinary course of his business. Many of these were relatively uncontroversial cases involving trade usages or similar matters of general commercial knowledge.[140] However, 19th century courts were also inevitably forced to confront the rather more difficult question of whether an insurer could complain of non-disclosure of facts that might be directly disclosed by, or inferred from, the growing number of information sources developed for the underwriting community at Lloyd's.[141] Beyond these, a number of cases illustrated, without significantly illuminating, the potentially important principle that 'waiver of disclosure' will preclude complaint[142]; whilst very few raised the uncontroversial principles that an insured need not disclose his speculations or apprehensions,[143] or what lessens the risk.[144] Overall, this jurisprudence seems remarkable for the relative absence of sustained doctrinal argument and discussion; the rarity with which *Carter v Boehm* is expressly mentioned; and the absence of critical comment on Lord Mansfield's statements. The inference that might be drawn, of their enduring tacit acceptance, is suggested by Mellor J's observations in *Bates v Hewitt* in 1867[145]:

> So far as I know, the judgment of Lord Mansfield has never been qualified or questioned. The only part of it upon which any doubt has been raised is, as to the

[139] Cf *Planche v Fletcher* (1779) 1 Doug 251, 99 ER 164.

[140] Cf *Vallance v Dewar* (1808) 1 Camp 503, 170 ER 1036; *Tennant v Henderson* (1813) 1 Dow PC 324, 3 ER 716; *Tate & Sons v Hyslop* (1885) 15 QBD 368; *The Bedouin* [1894] P 1; *Mercantile Steamship Co Ltd v Tyser* (1880) LR 7 QBD 73; *Asfar & Co v Blundell* [1896] 1 QB 123. And more generally, *Planche v Fletcher* (1779) 1 Doug 251, 99 ER 164; *Thomson v Buchanan* (1782) 4 Brown PC 482, 2 ER 329.

[141] See esp *Friere v Woodhouse* (1815–17) Holt 572, 171 ER 345; *Elton v Larkins* (1831) 5 Car & P 86, 172 ER 888; (1832) 8 Bing 196, 131 ER 376; (1832) 5 Car & P 385, 172 ER 1019; *Mackintosh v Marshall* (1843) 11 M & W 116, 152 ER 739; *Foley v Tabor* (1861) 2 F & F 663, 175 ER 1231; *Gandy v Adelaide Marine Insurance Co* (1871) LR 6 QB 746; *Morrison v Universal Marine Insurance Co* (1872) LR 8 Ex 40, rvd on a different point, (1873) LR 8 ER 197. Cases also raised the more general question, how far an insurer could complain of non-disclosure of facts that could or might be inferred from knowledge that he had or ought to have had: esp *Bates v Hewitt* (1867) LR 2 QB 595; *Gandy v Adelaide Marine Insurance Co* (1871) LR 6 QB 746.

[142] Cf *Beckwith v Sydebotham* (1807) 1 Camp 116, 170 ER 897; *Fort v Lee* (1811) 3 Taunt 381, 128 ER 151; *Hull v Cooper* (1811) 14 East 479, 104 ER 685; *Boyd v Dubois* (1811) 3 Camp 138, 170 ER 1331; *Freeland v Glover* (1806) 7 East 457, 103 ER 177, all of which were cited in later works, not always easily, under this head. See, eg EL de Hart and RI Simey (eds), *Arnould on the Law of Marine Insurance*, 7th edn (London, Stevens & Sons, 1901) §§ 618–622.

[143] Cf *Thomson v Buchanan* (1782) 4 Brown PC 482, 2 ER 329; *Bell v Bell* (1810) 2 Camp 475, 170 ER 1223.

[144] Cf *Westbury v Aberdein* (1837) 2 M & W 267, 150 ER 756.

[145] *Bates v Hewitt* (1867) LR 2 QB 595, 610.

> admissibility in evidence of the opinions of brokers . . . as to the materiality of the facts not communicated.[146] That judgment rests on a sound principle, and has always been considered as laying down the true rules which govern the law of insurance (footnotes omitted).

Even clearer evidence of the enduring status of Lord Mansfield's statements came 40 years further on, with the codification of the Common law governing marine insurance in the Marine Insurance Act 1906. That Act's basic structure, in sections 17 and 18, bears an unmistakable resemblance to Lord Mansfield's account. Section 17 states the mutual obligations of good faith of insurer and insured. Section 18 then states basic obligation on an assured to disclose every material circumstance known to him,[147] the applicable standard of materiality,[148] and then, finally, and crucially, the exceptions[149]:

> (3) In the absence of inquiry the following circumstances need not be disclosed, namely:
>
> (a) Any circumstance which diminishes the risk;
> (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know.
> (c) Any circumstance as to which information is waived by the insurer;
> (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

In *Chalmers' Marine Insurance Act*,[150] *Carter v Boehm* is the earliest, and in one case, the only authority, cited in the notes to paragraphs (a), (b) and (c). Even paragraph (d) was reflected in other decisions of Lord Mansfield.[151]

It is an important question, beyond the scope of this chapter, whether beneath this coincidence of general principles, the balance of the law in fact altered. It is conceivable that it could and did, without fatally undermining *Carter v Boehm*'s authority. A number of the exceptions formulated by Lord Mansfield are inherently susceptible to very different interpretations, reflecting very

[146] For discussion of this early debate, see, eg Arnould, *A Treatise on the Law of Marine Insurance and Average* (n 103 above) § 212; JW Smith, *A Selection of Leading Cases on Various Branches of the Law*, 2nd edn (London, A Maxwell, 1841) vol 1, 283–6, a discussion continued in later editions. In *Carter* (n 1 above) 3 Burr 1905, 1918; 97 ER 1162, 1168–9, Lord Mansfield refused to admit the actual broker's opinion that Boehm would not have underwritten the policy if the matters not disclosed had been revealed. In later cases, Lord Mansfield was assumed, perhaps wrongly, to be laying down a general principle regarding the admissibility of the evidence of brokers and/or underwriters.

[147] Marine Insurance Act 1906, s 18(1).

[148] Marine Insurance Act 1906, s 18(2).

[149] Marine Insurance Act 1906, s 18(3).

[150] ER Hardy Ivamy, *Chalmers' Marine Insurance Act 1906*, 10th revised edn (London, Tottel Publishing, 1993).

[151] See *Shoolbred v Nutt* (1782) noted in Park, *A System of the Law of Marine Insurance* (n 116 above) 229a. See, subsequently, *Haywood v Rodgers* (1804) East 590, 102 ER 957. Cf also *Ross v Bradshaw* (1761) 1 Black W 312, 96 ER 175 (life insurance).

different conceptions of where the line should properly be drawn between what insureds should tell their insurers without inquiry, and what insurers should know or seek to inform themselves of, by inquiry of the insured or otherwise.[152] Advocates of narrowly-defined exceptions could emphasise Lord Mansfield's initial emphatic statement of the insured's obligation, and the importance of preserving the strongest incentives for full disclosure.[153] Conversely, advocates of more widely-defined exceptions could emphasise Lord Mansfield's limited rationalisation of the insured's obligation as a corrective for an inequality of accessible information, the mutuality of the requirement of good faith that arguably Lord Mansfield assumes, and the actual manner in which Lord Mansfield resolved the case at hand.[154]

2. The Context and Construction of the Policy

Lord Mansfield's statement of law in *Carter v Boehm* placed important obstacles in the way of Boehm's success, which Boehm's counsel may not have predicted when proceedings first commenced. Two further factors combined to make Boehm's task even more difficult: Lord Mansfield's findings regarding the context in which Carter's insurance policy was effected in London; and his findings regarding the proper construction of the policy, and in particular, the insured-against contingency.

(a) The Circumstances in which Carter's Insurance Policy was Effected

Lord Mansfield prefaced his consideration of Boehm's particular allegations of material non-disclosure with the following account of the circumstances in which Carter's policy was effected in London in May 1760[155]:

> The policy was signed in May 1760. The contingency was 'whether Fort Marlborough was or would be taken, by a European enemy, between October 1759, and October 1760'.
>
> The computation of the risque depended upon the chance, 'whether any European power would attack the place by sea.' If they did, it was incapable of resistance.
>
> The under-writer at London, in May 1760, could judge much better of the probability of the contingency, than Governor Carter could at Fort Marlborough, in September 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, every thing which was known at Fort Marlborough in September 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company; and, particularly, from the governor. He knew what probability there was of the Dutch committing or having committed hostilities.
>
> Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by a European power.

Set against Lord Mansfield's preceding exposition of the law, the purpose of this account seems clear: viz, to emphasise the prima facie obstacles to Boehm's successfully resisting liability for non-disclosure. Lord Mansfield's premise was that the context in which Carter's policy was underwritten by Boehm lacked the substantial inequality of accessible information, and resulting necessary dependence of the insurer on disclosure by his prospective insured, that provided the normative basis for the law's allowing an insurer to avoid liability for non-disclosure. An understanding of the historical context of *Carter v Boehm* enables us to see quite how robustly adverse to Boehm's interest that analysis was.

Lord Mansfield's principal proposition was that Boehm, in London in May 1760, was substantially better placed accurately to estimate the likelihood of the insured-against contingency's occurring than Carter was in September 1759. This is difficult to dispute. If the contingency was the loss of Fort Marlborough to a European enemy,[156] an insurer would be concerned to estimate the likelihood of a European enemy attempting an assault, and of any assault succeeding. By May 1760, there was no substantial inequality of accessible information as regards either.

The likelihood of a European enemy attempting an assault on Fort Marlborough would principally be a function of events in Europe and the course of the Anglo-French conflict in the East Indies. By nature, these were not events falling peculiarly within Carter's knowledge. Indeed, by May 1760, the state of general intelligence in London regarding them was unquestionably in advance of the state of intelligence in Sumatra in September 1759. This was obviously true of European events, but it was also true of the Anglo-French conflict. Carter's most recent intelligence concerning events in India probably did not extend beyond the early spring of 1759.[157] In contrast, by May 1760, news had

[152] Cf analogously, the opposing conclusions reached in the *Pan Atlantic* litigation, regarding the standard of materiality assumed in *Carter v Boehm*: see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501. Steyn LJ in the Court of Appeal, and Lord Lloyd (dissenting) in the House of Lords took Lord Mansfield to be articulating a relatively demanding standard of materiality. Lord Mustill (giving the leading judgment for the majority in the House of Lords) reached an opposite conclusion.

[153] See, esp the reasoning of the court in *Bates v Hewitt* (n 145 above).

[154] See, esp the arguments reflected in the 'waiver of disclosure' cases noted at nn 267–269 below.

[155] *Carter* (n 1 above) 3 Burr 1905, 1914–15; 97 ER 1162, 1167.

[156] This is the assumption most favourable to Boehm, which Lord Mansfield makes in the quoted passage, though it does not reflect the construction of the policy that Lord Mansfield ultimately prefers: see 90–3 below.

[157] This would have been apparent to Lord Mansfield from the secret letter of Carter and Preston which was in evidence before the court. See IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee, Court of Directors, 16 September 1759, folio 287 ff, para 2, in which Carter and Preston related what they knew of events in India, and in particular, related that they had received reports from Batavia in August of the raising of the siege of Fort St George on 16 February 1759, but that their last direct communication from that Presidency was from the autumn of 1758. See further 104–5, nn 235–6 below.

certainly reached London of events from the summer and autumn of that year.[158]

The likelihood of any attempted assault by a European enemy succeeding would principally be a function of the strength of Fort Marlborough's defences, relative to the strength of any enemy force. The effect of Lord Mansfield's findings earlier in his judgment was that there was also no substantial inequality of accessible information in relation to this. It was notorious amongst those in London who interested themselves in East Indies affairs that Fort Marlborough was essentially a trading community, and not a military establishment; that it was only intended and constructed to withstand a native attack; and that if attacked by a European enemy, it would fall.[159] Assuming such knowledge, any calculation of the insured risk would depend only on a calculation of the chances of a European attack.[160]

There is no doubt that this absence of any substantial inequality of accessible information regarding the circumstances likely to influence an insurer's calculation greatly complicated Boehm's task. It inevitably made it difficult for Boehm to satisfy a court that, in view of what he knew or could reasonably have known, any information not disclosed had actually affected his risk assessment, and/or would have affected a reasonable insurer's risk assessment. It also inevitably made it difficult for Boehm to identify any fact not disclosed by Carter, about which he was not precluded from complaining on the basis that it fell within one of the exceptions articulated by Lord Mansfield. Most were readily classifiable as matters of 'general intelligence' or 'common notoriety'.

The absence of any substantial inequality of accessible information did not mean, however, that Carter and Boehm had equal information. There were at least two matters, known to Carter in September 1759, and potentially influencing an insurer's estimate of the risk, that could not be assumed to be matters of general intelligence in London by May 1760. They formed the basis of Boehm's strongest allegations of non-disclosure, examined below. One was the existence and contents of Wynch's letter to Carter.[161] Another was the particular state of Fort Marlborough's fortifications in September 1759.[162]

[158] See the London press reports of March–April 1760, noted at n 240 below. Carter probably did not receive intelligence about the same events until late December 1759, as noted in the text to n 236 below.

[159] See *Carter* (n 1 above) 3 Burr 1905, 1912–13; 97 ER 1162, 1166, where Lord Mansfield's findings regarding the general condition of Fort Marlborough are followed by the findings that 'the general state and condition of the said fort, and of the strength thereof, was, in general well known, by most persons conversant or acquainted with Indian affairs, or the state of the Company's factories or settlements; and could not be kept secret or concealed from persons who should endeavour by proper inquiry, to inform themselves'. It is clear that Fort Marlborough's defensive weaknesses were long-standing, and a recurring topic in the general dispatches between Fort Marlborough and the Court of Directors: see generally Harfield, *Bencoolen* (n 7 above).

[160] See *Carter* (n 1 above) 3 Burr 1905, 1914; 97 ER 1162, 1167: 'The computation of the risque depended upon the chance, "whether any European power would attack the place by sea." If they did, it was incapable of resistance'.

[161] See 67–9 above, and 94–9 below.

[162] See 71–2 above, and 99–104 below.

Lord Mansfield's second major proposition in his account of the London context of Carter's policy may have been designed to pre-empt the success of these arguments. His account concluded with the observation that, whatever might otherwise be known in London, Boehm knew or might have known everything known at Fort Marlborough in September 1759 regarding events in the East Indies, and the particular state of Fort Marlborough's fortifications, via the *Pitt*, which brought Carter's insurance instructions to England.[163] On the face of it, this comes dangerously close to the proposition that everything material known to Carter was known to, or knowable by, Boehm by May 1760.

The basis for this remarkable second proposition is an important fact, known to Lord Mansfield but not revealed by the case reports. Every fact that Carter knew in September 1759, and had allegedly concealed, was communicated by Carter via the packet of secret correspondence dispatched on the *Pitt* for the attention of the Secret Committee of the Court of Directors.[164] It obviously followed that on the *Pitt*'s arrival in Europe, none of the facts allegedly concealed were exclusively within Carter's private knowledge, and further, that they were known in London, in some quarters. However, on one reading of Burrows' report, Lord Mansfield went rather further than this. Boehm must have known that the Company would have received correspondence from Carter via the *Pitt*, and might at least have discovered its contents by means of inquiry open to him. This is a very difficult assumption to sustain.

The arrival of an East Indiaman like the *Pitt* would certainly have been keenly awaited in London, as the primary source of news from the East Indies. A snapshot of the contemporary press suggests the *Pitt*'s arrival may have attracted particular attention, because of a path-breaking journey to China.[165] It also suggests that the *Pitt* was a means by which news of recent events in the East Indies became matters of general intelligence in London,[166] and that this included news of some events, known to Carter in September 1759 and potentially bearing on

[163] *Carter* (n 1 above) 3 Burr 1905, 1914–15; 97 ER 1162, 1167.

[164] See 70–2 above, where the contents of this secret packet are discussed. It included Carter and Preston's secret letter of 16 September 1759, which reported (inter alia) the poor state of Fort Marlborough's fortifications (paras 12–19), Wynch's letter (paras 10–11), and the Dutch armament at Batavia (para 7): IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff. It also included a copy of Wynch's letter to Roger Carter. Lord Mansfield had Carter and Preston's letter before him.

[165] London papers noted its arrival, reporting that on 1 March 1760, the Company received an account of the *Pitt*'s arrival at Kinsale (where it had arrived on 23 February 1760: IOR/L/MAR/B/525, index to marine records): eg *London Chronicle* (1–4 March 1760) 219, cols 1; *London Evening Post* (1–4 March 1760) 1, cols 1–2. The *Pitt*'s remarkable China voyage is reported in the same papers, following the *Pitt*'s subsequent arrival in the Thames in mid-April: eg *London Chronicle* (15–17 April 1760) 370, col 2; similarly, *London Evening Post* (15–17 April 1760) 1, col 2. For discussion of the voyage, see P Crowhurst, *The Defence of British Trade* (Folkestone, Dawson, 1977) ch 7, esp 229–33.

[166] See esp *London Chronicle* (1–4 March 1760) 219, cols 1–2 (advices received via the *Pitt* regarding Colonel Clive's exploits); similarly, *London Evening Post* (1–4 March 1760) 1, col 1. The *Pitt* arrived in Company with the *Warren*, which brought more recent intelligence from Fort St George of events on the Coromandel Coast after the raising of the siege of Fort St George.

the risk insured-against: viz, news of the Dutch armament at nearby Batavia, which reports suggest came from the *Pitt*'s crew.[167] Nevertheless, there is no evidence that the contents of Carter's correspondence addressed to the Secret Committee of the Court of Directors similarly became public. Indeed, it is inherently unlikely that it would: such secret correspondence would ordinarily have had a very limited circulation, even within the Company's Directorship.[168] For the same reason, the lesser claim that Boehm might have discovered the contents of the correspondence by inquiry of the Company,[169] seems questionable. It may depend on some bold but unarticulated assumptions about Boehm's personal connections and influence.[170]

(b) The Construction of the Policy: The Insured-against Contingency

The fate of Boehm's allegations in *Carter v Boehm* was not just vitally shaped by the court's findings regarding the context in which the policy was effected. It was also vitally shaped by the court's findings regarding the proper construction of the policy, and in particular, the insured-against contingency. This was a matter fiercely disputed by the parties in argument.[171] At first sight, this may seem surprising: on any analysis, the insured-against contingency had occurred,

[167] *London Evening Post* (11–13 March 1760) 1, col 2. See further 109–10 below. The final sentence of Lord Mansfield's description of the context of the policy, in which he refers to Boehm's knowledge of the likelihood of Dutch aggression, suggests that he may have recognised this: *Carter* (n 1 above) 3 Burr 1905, 1915; 97 ER 1162, 1167.

[168] The Secret Committee comprised a small number of the full body of Directors. The Court Books show that letters addressed to the Secret Committee might be read to the full Court of Directors, but that this was not routinely the case. Instead, the minutes and proceedings of the Secret Committee, to the extent that they were no longer sensitive, would periodically be read at the meetings of the full Court of Directors. Unlike the general letter from Fort Marlborough of 21 September 1759, there is no record of Carter and Preston's secret letter of 16 September 1759 having been read to the full Court of Directors (see 70, n 58), but the Court Books do indicate that they subsequently received a summary of the Secret Committee's deliberations during this period. See IOR/B/75, Minutes of Meeting of Court of Directors, 1 April 1760, 672 (reading of minutes and proceedings of the 'Committee of Secrecy' from 5 December 1759 to 31 March 1760).

[169] Cf similarly, Marshall, *A Treatise on the Law of Insurance* (n 103 above) 482n: 'What he wrote to the company was not likely to be made public, and therefore not likely to come to the knowledge of the underwriter!'. Lord Mansfield's assumption is also difficult to square with the Company's resistance to disclosing Carter and Preston's secret letter during the litigation: see 95 below.

[170] Boehm undoubtedly occupied prominent positions in some of the City's key institutions at this time, including a directorship of the Bank of England: see R Roberts and D Kynaston, *The Bank of England—Money, Power & Influence 1694–1994* (Oxford, Oxford University Press 1995) appendix 2. JG Parker, 'The Directors of the East India Company 1754–1790' (PhD thesis, University of Edinburgh, 1977) is a good starting-point for further inquiry into the nature and extent of Boehm's family or other connections to the East India Company's directorship. I am grateful to Professor Huw Bowen, University of Leicester, for directing my attention to this.

[171] See *Carter* (n 1 above) 3 Burr 1905, 1908; 97 ER 1162, 1163–4, where counsel's arguments are summarised. Counsel for the insured: '[T]his insurance, was in reality, no more than a wager; "whether the French would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river, or not"'. Counsel for the insurer: 'This wager is not only "whether the fort shall be attacked:" but "whether it shall be attacked and taken"'.

and Boehm was prima facie liable to pay the insured sum. On closer examination, however, the reason is obvious. The parties saw that the construction preferred might vitally affect the success of Boehm's defence, that Carter was guilty of material non-disclosure in failing to disclose Fort Marlborough's weak defensive state in September 1759.

Lord Mansfield's firm conclusion was that the contingency in the parties' contemplation was an attack on Fort Marlborough by a European enemy. It was not, as Boehm's counsel had contended, the loss of Fort Marlborough, so as to require Fort Marlborough to be attacked and taken.[172] There are two reasons why this conclusion is striking. First, it was a notably pro-insured construction of the policy: it greatly facilitated the court's rejection of Boehm's allegation that Fort Marlborough's weak defensive state in September 1759 was a 'material' matter which Carter was obliged to disclose.[173] Secondly, that construction probably required an important implication into Carter's policy, varying its express terms. Although this point can be obscured by poor reporting of the case, the best account of the policy's express terms suggests that the insurer's liability in terms depended upon the loss of Fort Marlborough to a European enemy, and not merely an attack on the place. That is, the policy's express terms were more consistent with Boehm's analysis of the insured-against contingency than that which the court eventually preferred. In Lord Mansfield's words,

> [t]he policy is against the loss [of] Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between 1st of October 1759, and 1st of October 1760.[174]

Pointing in the same direction was the 'all or nothing' nature of the insurer's liability. If the insured-against contingency occurred, the insurer was liable to pay the insured sum of £10,000, in full and without further inquiry.[175]

There is obvious room for disagreement about the process by which Lord Mansfield felt able to conclude, in the face of the policy's express terms, that the insured-against contingency was a European enemy attack. It would certainly be consistent with the general orientation of his judgment if his conclusion was simply the result of a strong inclination to find against Boehm. However, a preferable alternative analysis is that it reflected a bona fide attempt to make commercial sense of the policy's unusual terms, in view of the policy's known purpose.[176]

[172] *Carter* (n 1 above) 3 Burr 1905, 1916–17; 97 ER 1162, 1167–8.

[173] See 97–9 below.

[174] *Carter* (n 1 above) 3 Burr 1905, 1911; 97 ER 1162, 1165. Different descriptions of the contingency elsewhere in the report are unreliable, in that they do not seem to state the express terms of the policy, but instead, to express the outcome of Lord Mansfield's exercise in construction: viz, his implied reading down of the policy's express words. See too the reported terms of Carter's counsel's argument, quoted in n 171 above, the sense of which is that even if the form of the policy suggested the contrary, its substance was a policy against a European enemy attack only.

[175] See 77 above. Properly understood, this was what Lord Mansfield meant when he said that the policy 'insures against a total loss': *Carter* (n 1 above) 3 Burr 1905, 1916; 97 ER 1162, 1167.

[176] See 75–9 above.

Central to understanding this is the apparent disjunction between the form and purpose of the policy, previously explained.[177] Had Carter been a true wagering party, without any substantial interest in Fort Marlborough's fate, there would have been no pressing reason for the court to take the policy otherwise than at face value. It would not be irrational for the parties to wager 'all or nothing' on whether Fort Marlborough might be lost to a European enemy. The problem confronting the court, however, was that Carter was not a true wagering party.[178] To the knowledge of the insurer and the court, he sought to insure his stock-in-trade at Fort Marlborough against loss in the event of a European enemy assault on the place.[179] The policy's express terms were less obviously well-tuned to that different purpose. On the one hand, the insurer was only liable in the most extreme event of an assault culminating in the fall of Fort Marlborough. On the other hand, if that event occurred, the insurer would be liable for the full insured sum, without further inquiry.

On examination, Lord Mansfield's reconciliation appears to have been as follows.[180] The insured-against contingency was a European enemy attack on Fort Marlborough, and not its loss. Though at first sight inconsistent with the policy's express terms, this analysis could be reconciled with them and with the policy's purpose, via the assumption that the parties knew that Fort Marlborough was only designed to withstand native attack, and so anticipated that it would fall if it were subject to an attack by a European enemy. Assuming such knowledge, it was not commercial nonsense for the parties to bargain that the insured sum should be payable in full, and without further inquiry, in the event of a European enemy attack. The parties would anticipate that any European enemy attack on Fort Marlborough would result in a total loss of Carter's stock-in-trade there, the value of which exceeded the sum insured.[181] This analysis is the best way of making sense of the following passage in Burrows' report, where Lord Mansfield explains his analysis of the insured-against contingency[182]:

> The utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be . . . What is that condition? All the witnesses agree 'that it was only to resist the natives, and not an European force.' The policy insures against a total loss; taking for granted 'that if the place was attacked it would be lost.'

[177] See 75–9 above.
[178] See 75–9 above.
[179] See 75–6 above.
[180] See esp *Carter* (n 1 above) 3 Burr 1905, 1915–16; 97 ER 1162, 1167–8. Identical assumptions about the policy's purpose, and what the parties knew about its subject-matter, could have supported a construction which took the policy at face value, taking the insured-against contingency as the *loss* of Fort Marlborough; but even on this basis, Carter's non-disclosure would not have been 'material', for reasons explained at 98–9 below.
[181] See, eg *Carter* (n 1 above) 3 Burr 1905, 1907 and 1913; 97 ER 1162, 1163 and 1166.
[182] *Carter* (n 1 above) 3 Burr 1905, 1915–16; 97 ER 1162, 1167.

> The contingency therefore which the under-writer has insured against is, 'whether the place would be attacked by an European force; and not whether it would be able to resist such an attack, if the ships could get up the river.'

Lord Mansfield never made any clear finding whether Boehm actually knew that Fort Marlborough was only designed to withstand native attack.[183] However, he had previously found that this was generally known, amongst those who concerned themselves with East Indies' affairs. On that basis, it seems that Lord Mansfield was adopting an objective interpretative approach, construing the parties' express/implied intentions in light of the knowledge that they could reasonably be expected to have about the policy's subject-matter. Consistently with this approach, Boehm could not have demanded that the policy be construed in accordance with his own, ex hypothesi unreasonable state of ignorance regarding Fort Marlborough's true condition.

3. Boehm's Defences to Liability

With Lord Mansfield's statement of law, and his findings regarding the context and construction of Carter's policy in view, we can turn to the court's treatment of Boehm's defences to liability. In the absence of any finding of fraudulent intention on Carter's part, Boehm's case depended on establishing material non-disclosure. This required Boehm to identify some matter, known to Carter or his agent but not disclosed, that varied the risk which Boehm undertook in May 1760 when he underwrote Carter's policy—viz, the risk of a European enemy attack on Fort Marlborough within one year from October 1759.

The strongest allegation, that Carter knew of a subsisting French scheme to attack Fort Marlborough, was not available to Boehm. There was no such scheme, to Carter's knowledge, in September 1759, when the insurance instructions were dispatched. And whilst D'Estaing's expedition certainly did come to Carter's knowledge in Sumatra by late February 1760, it was impossible to convey this knowledge to London before the policy was effected. Counsel quite rightly refrained from arguing that this non-disclosure would vitiate Carter's policy.[184]

In those circumstances, Boehm was left to allege non-disclosure of three other matters, to which Lord Mansfield added a fourth. They were: the poor defensive state of Fort Marlborough in September 1759; Alexander Wynch's letter to Roger Carter of February 1759, in which he reported the unimplemented French plans of 1758; Carter's apprehension that the French were more likely than

[183] See 88 above.
[184] See now the Marine Insurance Act 1906, s 19(2), which contains an exception for exactly this sort of case, where policies are effected by agents: the policy will be vitiated by non-disclosure of every material circumstance 'which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent'.

before to attack, expressed in his letter to his brother of 22 September 1759; and finally, Carter's grounds for fearing the outbreak of a Dutch war. These allegations, and the court's treatment of them, are examined in the sections that follow.

E. MATERIAL NON-DISCLOSURE (I): THE DEFENSIVE CONDITION OF FORT MARLBOROUGH

1. Background

Boehm's first objection to liability under the policy relied on Fort Marlborough's weak defensive condition. It was probably the objection most strongly pressed, at least on the motion for re-trial.[185] As formulated by counsel, the argument was that Carter was guilty of material non-disclosure in failing to disclose Fort Marlborough's defensive state in September 1759. An alternative formulation, reflected in some reports of Lord Mansfield's discussion of the allegation, was that there was an implied warranty in Carter's policy that Fort Marlborough was in a good defensive state, which had been breached.[186]

Viewed in its historical context, the force of Boehm's argument is obvious. On 24 September 1759, when the *Pitt* left Sumatra for London with Deputy Governor Carter's insurance instructions on board, Carter unquestionably knew that Fort Marlborough was unlikely to be able to withstand a concerted European attack. Its vulnerability had been a constant cause for concern for the Company's West Coast servants in the preceding years. It was also unequivocally confirmed by the inquiries conducted by the military officers, on the orders of Carter and the Secret Committee in August–September 1759, immediately following the arrival of Wynch's letter.[187]

What made this first allegation particularly attractive for Boehm was that the available evidence incontrovertibly showed that Carter knew of, but had failed to disclose, Fort Marlborough's weak defensive state. By their secret letter of

[185] *Carter* (n 1 above) 3 Burr 1905, 1908; 97 ER 1162, 1164: 'It is begging the question to say, "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose: and the presumption was "that the fort, the powder, the guns, &c were in a good and proper condition." If they were not, (and it is agreed that in fact they were not, and that the governor knew it,) it ought to have been disclosed. But if he had disclosed this, he could not have got the insurance'.

[186] In Burrows's report, the implied condition argument is interwoven with an argument about material non-disclosure: *Carter* (n 1 above) 3 Burr 1905, 1915–16; 97 ER 1162, 1167. In Blackstone's briefer report, the reasoning is arguably in implied conditions terms only: 1 Black W 593, 595; 96 ER 342. The argument was founded on an analogy with the warranty of seaworthiness implied into marine insurance policies. Later cases were to confirm that these arguments were alternatives: an insured was not obliged to disclose matters falling within the scope of an express or implied warranty. See n 137 above.

[187] IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 22 August 1759, folios 267–9 (discussed at 69 above); *ibid* 7 September 1759, folios 271–2 (discussed at 69 above).

16 September 1759, described above, Carter and Preston comprehensively reported Fort Marlborough's dire position to the Secret Committee of the Court of Directors.[188] At the time of the 1762 actions on Carter's policy, the Company had apparently refused to deliver this letter to the parties, 'because it contained some matters which they did not think proper to be made public'.[189] However, Boehm *was* able to obtain possession of the letter for the purposes of the 1766 trial/motion for re-trial.[190]

Lord Mansfield's statement of the law in *Carter v Boehm*, and his subsequent findings of fact, were nevertheless to expose important vulnerabilities in Boehm's case. First, Boehm's allegation that Fort Marlborough's weak defensive state was material to the insured risk depended heavily on a construction of the policy which Lord Mansfield ultimately rejected: viz, that the insured-against contingency was the loss of Fort Marlborough to a European enemy.[191] Secondly, Lord Mansfield's statement of the law in any event made the parties' relative states of knowledge regarding Fort Marlborough's defensive state critical. Lord Mansfield made a number of findings in this regard, which—directly or indirectly—were to prove fatal to Boehm's argument.[192]

These findings have already been considered. Their relationship to Boehm's first allegation needs to be clearly perceived. The allegation is best understood as an allegation that Carter had not disclosed the particulars of Fort Marlborough's defensive state in September 1759, which Carter and Preston related in their secret letter of 16 September 1759. Some passages in Lord Mansfield's judgment suggest an assumption that Boehm could have discovered these particulars, by means of inquiry open to him, in May 1760. This is a very questionable assumption, as previously explained,[193] and it was not necessary for Lord Mansfield's decision. Even if the particulars of Fort Marlborough's defensive state in September 1759 were not known to, or reasonably discoverable by, members of

[188] IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, paras 10–18 (discussed at 71–2 above).

[189] See *Carter* (n 1 above) 3 Burr 1905, 1911; 97 ER 1162, 1165. It can be inferred that Lord Mansfield is referring to Carter and Preston's letter. The request for copies of the Company's 'late Advices' from Bencoolen for the 1762 trial is recorded in IOR/B/77, Minutes of Meeting of Court of Directors, 10 February 1762, 292. Carter and Preston's letter would have revealed the intelligence-gathering activities of John Herbert, the Company's agent at Batavia. But on balance, the Company's sensitivities are most likely to have stemmed from a desire to keep concealed their efforts to obtain Chinese slaves via the supracargoes at Canton: IOR/G/35/12, Letter from Roger Carter and Richard Preston to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, paras 3–6.

[190] See *Carter* (n 1 above) 3 Burr 1905, 1913, 1913n; 97 ER 1162, 1166, 1166n. The Company's records put beyond doubt that the secret letter of 16 September 1759 was the letter brought to court: see the resolutions that the 'Proper Officer' on being subpoenaed should attend, with the letter, the insurance cause being tried between 'William Black and Charles Boehm Esqrs' and Roger Carter: IOR/B/81, Minutes of Meeting of Court of Directors, 4 December 1765, 272; *ibid* 19 February 1766, 363.

[191] See 90–93 above.

[192] See 88 above.

[193] See 89–90 above.

the London underwriting community in May 1760, Boehm knew or could reasonably be expected to know the 'general state' of the place, or could have discovered the 'general state' of the place by reasonable inquiry. Hence he knew or could have known that it was a trading settlement, fortified and garrisoned to resist native attack only, and ex hypothesi unable to withstand an attack by a European enemy.

2. The Court's Rejection of the Argument

(a) 'Waiver of Disclosure'

Lord Mansfield's first response was that Boehm had waived disclosure of Fort Marlborough's defensive state by Carter, and taken the burden of inquiry upon himself. Lying behind this response was a dilemma that Carter necessarily faced as a consequence of his position as Company servant and Deputy Governor. It was quite conceivable that Carter could not disclose the particulars of Fort Marlborough's defensive state in September 1759, except at the cost of breaching his obligations of confidentiality to his employer.[194] Carter's own perception of the sensitivity of this information in September 1759 is certainly suggested by his chosen means of communication via the *Pitt*. The matter was not mentioned in the Fort Marlborough Council's general letter of 21 September 1759, addressed to the Court of Directors[195]; nor in Carter's private letter to his brother of 22 September 1759.[196] It was mentioned only in Carter and Preston's secret letter of 16 September 1759, addressed to the Secret Committee of the Court of Directors.[197] This was a mode of communication that would have ensured that it had a very limited readership even within the Company's Directorship in London.

Against this background, Lord Mansfield might have answered that the dilemma was for the insured to resolve, and that he bore the risk of his failure to disclose.[198] However, Lord Mansfield's actual response offered a very different reconciliation of the competing interests of insurer and insured. He was willing to find that Boehm had accepted the burden of inquiry into Fort

[194] For an example of the covenant typically signed by covenanted servants of the Company, which included an express confidentiality clause, see IOR/O/1/1.

[195] IOR/G/35/12, Letter from Fort Marlborough to the Court of Directors, 21 September 1759, folios 302–31. See 70 above.

[196] This is implicit in Boehm's counsel's argument, that 'the plaintiff' (that is, Carter's brother) ought in any event to have inquired about Fort Marlborough's state: see *Carter* (n 1 above) 3 Burr 1905, 1908; 97 ER 1162, 1164.

[197] IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff. See 71–2 above.

[198] Cf Marshall's even more extreme response, writing 50 years later, which was that a policy that placed an insured in such a dilemma should be void on public policy grounds: Marshall, *A Treatise on the Law of Insurance* (n 103 above) 484.

Marlborough's defensive state.[199] This conclusion followed from Boehm's having underwritten the policy, without inquiry, in the following circumstances.

First, Boehm knew that he could not reasonably depend on the insured's having disclosed all circumstances that might bear adversely on his calculations, because he knew that Carter was duty-bound to his employer not to disclose Fort Marlborough's defensive state. In Lord Mansfield's words,

> [t]he underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistent with his duty.[200]

Secondly, Boehm was not exclusively dependent on disclosure by Carter in practice, because Fort Marlborough's defensive state was not exclusively within Carter's private knowledge, and could be ascertained by other means. In Lord Mansfield's words,

> [i]t was a matter as to which he might be informed various ways: it was not a matter within the private knowledge of the governor only.[201]

By themselves, these central premises can be regarded as rather unfavourable to Boehm, the insurer. Thus, it seems particularly difficult to sustain the assumption that Boehm might have readily obtained information regarding Fort Marlborough's particular condition in September 1759, rather than merely its general condition, for reasons already explained.[202] However, if read in conjunction with other passages of Lord Mansfield's judgment, his analysis in these passages may not have been as robust as the reports suggest. It is probable that Lord Mansfield's conclusions also depended on a third unstated circumstance: viz, that Boehm had reasons to undertake his own burdensome inquiries, because he had reasons to suspect that Carter was withholding adverse knowledge regarding Fort Marlborough's defensive state.[203] Such reasons, if required, could easily be found.[204]

(b) 'Immateriality' of the Poor State of the Fortifications

Burrows' report indicates that Lord Mansfield ultimately did not seek to rely on the 'waiver of disclosure' argument.[205] An alternative answer was available in any event: viz, the particulars of Fort Marlborough's defensive state in September 1759 were not material to the risk undertaken.

[199] See *Carter* (n 1 above) 3 Burr 1905, 1915; 97 ER 1162, 1167.

[200] *Carter* (n 1 above) 3 Burr 1905, 1915; 97 ER 1162, 1167.

[201] *Carter* (n 1 above) 3 Burr 1905, 1915; 97 ER 1162, 1167.

[202] For discussion of this assumption, see 88–90 above.

[203] For discussion of the passages manifesting this assumption, see 110–15 below.

[204] For discussion, see 114–15 below.

[205] *Carter* (n 1 above) 3 Burr 1905, 1915; 97 ER 1162, 1167 ('But, not to rely on that', viz, the waiver of disclosure/assumption of the burden of inquiry argument).

Lord Mansfield's conclusion that Carter's non-disclosure was 'immaterial' emerges only very obliquely from Burrows' report. Its basis should nevertheless be obvious. Lord Mansfield's preferred construction of the insured-against contingency meant that Carter's policy rendered the full insured sum payable, without further inquiry, in the event of an attack on Fort Marlborough by a European enemy.[206] It followed that the existence and extent of Boehm's liability as insurer depended only on whether a European enemy attacked Fort Marlborough, and not upon how far any attack was successful. It further followed that a reasonable insurer's risk assessment would only depend on factors influencing the likelihood of an attack being attempted by a European enemy. Hence, and subject to one caveat, the state of Fort Marlborough's defences was immaterial to the risk undertaken.

The caveat is that the state of Fort Marlborough's defences certainly did affect the likelihood of a European enemy attack, in that its notorious weakness made it a substantially more tempting target for small-scale, opportunistic raids of the type planned by the French in 1758, and ultimately carried into effect by D'Estaing in 1760. Carter and Preston clearly appreciated this in September 1759, when they wrote their secret letter to the Court of Directors.[207] However, whilst Lord Mansfield did not expressly address this point, he could easily have dismissed it. Lord Mansfield unquestionably considered that a London underwriter could reasonably be expected to know that Fort Marlborough was only designed to withstand native attack. Assuming that knowledge, he would know enough to indicate that Fort Marlborough would be a tempting target for a raid by a European enemy. That risk assessment would *not* be adversely affected by additional knowledge of the precise particulars of Fort Marlborough's weak defensive state in September 1759. A distant European enemy, planning a raid on the place, could not reasonably be expected to be aware of such details.

For very similar reasons, Boehm's first allegation would almost certainly have failed even if Lord Mansfield had preferred the construction of the insured-against contingency suggested by Boehm's counsel: viz, the loss of Fort Marlborough to a European enemy, and not merely an attack on the place. A reasonable underwriter, knowing that Fort Marlborough was only designed to withstand native attack, would contemplate that any attack on Fort Marlborough by a European enemy would result in its loss, and thus render him liable for the full insured sum.[208] The understanding of the risk being undertaken would not be adversely affected by additional knowledge of the precise particulars of Fort Marlborough's weak defensive state in September 1759. The only factors influencing his assessment of the risk would be those influencing the likelihood of an attack being attempted. This alternative route to the same conclusion is suggested by a preliminary passage in Lord Mansfield's judgment, discussed earlier,[209] in which he sets out the nature of Carter's policy[210]:

> The policy was signed in May 1760. The contingency was 'whether Fort Marlborough was or would be taken, by an European enemy, between October 1759, and October 1760.'
>
> The computation of the risque depended upon the chance, 'whether any European power would attack the place by sea,' If they did, it was incapable of resistance.

F. MATERIAL NON-DISCLOSURE (II): ALEXANDER WYNCH'S LETTER FROM THE CAPE OF GOOD HOPE

1. Background

Boehm's other arguments of non-disclosure focused directly on Carter's failure to disclose matters that might have affected the insurer's assessment of the risk of a European attack on Fort Marlborough. The strongest of these was the allegation that Carter had not disclosed the existence and contents of the letter that he had received from Alexander Wynch, dated 4 February 1759 at the Cape of Good Hope. This was the letter which reported French plans of 1758 to send a ship and 400 men to surprise the Company's West Coast settlements. This allegation required serious consideration by the court. Wynch's intelligence increased the perception of the risk of a French attack of both Carter in Sumatra and the Company in London, to an extent sufficient to prompt special precautions even as late as February 1760.

The heightened state of alert which Wynch's letter produced at Fort Marlborough, and the fundamental impact which it had on Carter's conduct, official and private, has already been considered.[211] Surviving contemporary sources indicate that an equivalent change in perception also occurred at East India House in London. By late June 1759, the Court of Directors had received a similar letter directly from Wynch, via Copenhagen.[212] The Directors' words and acts at the time of their next general dispatches to Fort Marlborough suggest that Wynch's letter had also increased their concerns for their West Coast

[206] See the discussion of the construction of the insured-against contingency at 90–93 above.

[207] See IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, para 19, quoted at 72 above.

[208] On examination, it seems that the breach of implied warranty argument was rejected on a similar assumption: viz, it was not necessary or reasonable to imply a warranty that Fort Marlborough was in a good defensive state to withstand a European enemy attack, in the light of the knowledge that the parties had or could reasonably be expected to have that Fort Marlborough was only designed to withstand a native attack. See *Carter* (n 1 above) 1 Black W 593, 595; 96 ER 342, 343: '[T]he fort, it is said, was not in the condition it ought to be. That condition ought only to be to resist an Indian force: it was notorious that it could not resist an European attack'. Similarly, at 3 Burr 1905, 1915–16; 97 ER 1162, 1167: 'The utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner as it is taken for granted, that the ship insured is seaworthy. What is that condition? All the witnesses agree "that it was only to resist the natives, and not an European force"'.

[209] See 86–90 above.

[210] *Carter* (n 1 above) 3 Burr 1905, 1914; 97 ER 1162, 1167.

[211] See 67–72 above.

[212] See 67–8, n 42 above.

servants, even though it was by then many months since the French plans were to have taken effect. The letter in question, dated 4 February 1760,[213] expressly referred to Wynch's reports[214]:

> You will long before receipt hereof have been advised of the several French Ships . . . which had been at the Cape of Good Hope in the beginning of last year as also of some others which the Gentlemen who were passengers on the *Grantham* and *Ilchester* had got information of during their stay at that place and whereof Mr Wynch took care to give our Deputy Governour an account by the way of Batavia, this it cannot be doubted had its due effect in your taking every possible precaution to be guarded from a Surprize or Sudden Attack from any part of the Enemy's force which you might have reason to judge would be directed against the West Coast.

The Court of Directors evidently considered that Wynch's letter to Carter would have justifiably provoked a heightened state of alert, and special measures, at Fort Marlborough. The remainder of the letter also shows the Court of Directors itself adopting or recommending a quite unprecedented combination of measures for Fort Marlborough's security.[215] Perhaps the most compelling single measure is the Directors' promise of 200 military recruits.[216] During the Seven Years' War, the general demands for manpower made it extremely difficult for the Company to raise troops[217]; and 200 European recruits represented a substantial addition to the garrison's existing strength.[218] In the Directors' own words,

> [t]he Military Stores now consigned to you together with the Officers and Soldiers upon these ships will show our Care of the West Coast.[219]

2. The Court's Rejection of the Argument

In light of the response of Carter and the Company to Wynch's intelligence, Lord Mansfield's response to Boehm's second allegation initially looks surpris-

[213] IOR/G/35/31, Rough Drafts of Dispatches to Fort Marlborough, Letter from Court of Directors to Fort Marlborough, 6 February 1760, folio 135 ff.

[214] *Ibid* para 19.

[215] IOR/G/35/31 (n 213 above) para 37 (indent for military stores fully complied with; additional guns not requested to be sent); para 42 (60 barrels of gunpowder sent to make up for those not received by earlier ships); para 71 (Fort Marlborough to be placed in a respectable condition not only to resist the 'Country Powers' but also to make a good defence against a European enemy); para 71 (Company's Presidencies in India to be directed to forward such military stores as they could spare); para 71 (special, secret committee to be established at Fort Marlborough); paras 55, 88 ff (regulations prescribed for the governance of Fort Marlborough in times of military emergency, recently laid down for the Company's Presidencies in India and 'especially absolutely necessary in time of war'); para 92 (200 military recruits to be sent); para 93 (four infantry companies of 100 men to be formed in future).

[216] IOR/G/35/31 (n 213 above) para 92.

[217] See IOR/G/35/31 (n 213 above) para 4, where these difficulties are expressly mentioned.

[218] On the garrison's history, see generally Harfield, *Bencoolen* (n 7 above). Sickness, deaths and desertions would reduce the effective numbers significantly below full strength, and had done so in the preceding period.

[219] IOR/G/35/31 (n 213 above) para 71.

ing. He did not hesitate in endorsing the jury's conclusion that Wynch's intelligence was not material. In simple terms, no underwriter in London in May 1760 could reasonably consider that this intelligence increased the risk being undertaken. Indeed, if anything, the intelligence would have suggested that the risk of French attack on Fort Marlborough was reduced. Lord Mansfield's reasoning emerges from the following passage in Burrows' report[220]:

> It was said—If a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud—I agree with it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumstance: because, it does not follow that they will cruise this year at the same time, in the same place; or that they are in a condition to do it. If the circumstance of 'this design laid aside' had been mentioned, it would have tended rather to lessen the risque than increase it: for, the design of a surprize which has transpired, and been laid aside, is less likely to be taken up again; especially by a vanquished enemy.

The first available explanation for this robust conclusion is simply that the court did not have before it the material required to appreciate fully the significance of Wynch's letter. The credibility of Wynch's intelligence stemmed from its having come from the French forces gathered at the Cape of Good Hope over the winter of 1758–59, which Wynch was witnessing and reporting. Although this would have been apparent from the terms of Wynch's letter, it would not have been apparent from the material actually before the court: Boehm's counsel did not provide any further information regarding the authorship, content and context of Wynch's letter, beyond what was incidentally revealed by Carter and Preston's secret letter of 16 September 1759.[221] This is immediately surprising, because means of further illumination certainly did exist. Thus, copies of Wynch's letter were dispatched from Bencoolen in the same secret packets as Carter and Preston's letter,[222] which Boehm had brought before the court, and survived in the Company's possession.[223] Similarly, at the trial, Carter's counsel had offered to read the letter which the Court of Directors

[220] *Carter* (n 1 above) 3 Burr 1905, 1917; 97 ER 1162, 1168. The preceding sentence, 'This is a topic of mere general speculation; which made no part of the fact of the case upon which the insurance was to be made', is difficult to make sense of.

[221] IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, para 10, quoted at 71 above.

[222] The Company received two copies, one in the original secret packet sent via the *Pitt* in September 1759, and a second in the duplicate of this packet sent via the *Earl of Holderness*, which eventually sailed for London in early February 1760. See IOR/G/35/12, List of contents of a duplicate secret packet, duplicating that sent via the *Pitt*, sent on the *Earl of Holderness*, folio 409.

[223] See today, IOR/G/35/12, Letter from Alexander Wynch, Cape of Good Hope, to Roger Carter, 4 February 1759, folios 262v–264. Annotations to this letter indicate that it is the copy sent in the duplicate secret packet sent on the *Earl of Holderness*: see n 222 above. The first paragraph of Carter and Preston's letter would probably have been sufficient to indicate that a copy of Wynch's letter was being enclosed with it.

had received from Wynch,[224] but this was objected to by Boehm's counsel, and the account was not read.[225] The inference that Lord Mansfield drew from this failure to provide or permit further illumination regarding Wynch's intelligence was that it must have been 'very doubtful'.[226] As Burrows reports,[227]

> [w]hat that letter was; how [Wynch] mentioned the design, or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.
>
> The plaintiff offered to read the account [Wynch] wrote to the East India Company: which was objected to; and therefore not read. The nature of that intelligence therefore is very doubtful.

Although this first explanation needs careful consideration, it ultimately seems inadequate. The thrust of Lord Mansfield's ensuing reasoning is that, even if Wynch's intelligence was wholly credible, taking it in its 'strongest light', the intelligence was still only a 'report of a design to surprise, the year before; but then dropt'[228]; and that such a report could not be 'material'.

On examination, Lord Mansfield's robust conclusion is much more satisfactorily explained on a second basis. Adopting an objective 'different risk' standard of materiality, Boehm needed to show that Wynch's intelligence would have adversely affected the risk perception of a reasonable London underwriter in May 1760, who was asked to insure Fort Marlborough against the risk of a European enemy attack for one year from October 1759. Lord Mansfield clearly assumed that in May 1760, a London underwriter could reasonably be expected to know of the recent state-supported conflict between the English and French East India Companies in India. He also clearly assumed that that knowledge would be sufficient to suggest to a London underwriter that there was some risk of an attack by French forces on the English Company's interests in Sumatra. If disclosed in May 1760, Wynch's letter would have confirmed the correctness of that risk assessment, to the extent that it would have shown that Fort Marlborough, previously merely a possible target, had definitely been in the enemy's contemplation. However, it would not follow that in May 1760, the knowledge of the definite but unimplemented plans of 1758 would adversely affect a London underwriter's perception of the risk of a French attack during the policy's term. Whether the underwriter's perception would be affected in this way would fundamentally depend on the underwriter's assessment of the likelihood of the 1758 plans being revived during that period. This, in turn,

[224] This was almost certainly the letter which the Court of Directors received directly from Wynch by way of Copenhagen some time in June 1759: see IOR/B/75, Minutes of Meeting of Court of Directors, 27 June 1759, 386, recording the reading of correspondence from Wynch at the Cape of Good Hope of February 1759, received by way of Copenhagen.

[225] *Carter* (n 1 above) 3 Burr 1905, 1917; 97 ER 1162, 1168.

[226] *Ibid.*

[227] *Carter* (n 1 above) 3 Burr 1905, 1916–17; 97 ER 1162, 1168.

[228] *Carter* (n 1 above) 3 Burr 1905, 1917; 97 ER 1162, 1168.

would fundamentally depend on what in May 1760 the underwriter could reasonably be expected to know about the recent course of the Anglo-French conflict in the East Indies.

The key to unlocking Lord Mansfield's reasoning is the fact that the state of Carter's knowledge regarding this conflict in September 1759, and the likely state of a London underwriter's knowledge in May 1760, were materially different. This difference can explain how Lord Mansfield could justifiably reject Wynch's letter as immaterial, despite clear evidence that its receipt had had a fundamental impact on Carter's conduct in August–September 1759. Carter and Preston's secret letter of 16 September 1759 would have incidentally revealed that Carter's reaction rested on incomplete information about the Anglo-French conflict in India, which did not extend substantially beyond the ending of the siege of Madras.[229] An underwriter in May 1760 could reasonably be expected to have substantially more recent and complete information. Even more critically, that information could also reasonably be expected to result in a very different assessment of the likelihood of the French plans of 1758 being revived. Those plans were conceived in the first few months of the conflict on the Coromandel Coast, after the French forces had scored some important successes. Beginning, however, with the raising of the siege of Madras on 16 February 1759, the tide of the Anglo-French conflict had increasingly turned against the French. Armed with knowledge of that altered background, a London underwriter might reasonably conclude that the French plans of 1758 could not be, or would not be, revived during the policy's term: any available sea and land forces would be consumed by the conflict in India.[230] On that basis, Wynch's letter would have no adverse affect on the underwriter's risk assessment.

That this was what Lord Mansfield intended is suggested by the final, crucial clause of Burrows' report of his reasoning:

> the design of a surprize which has transpired, and been laid aside, is less likely to be taken up again; *especially by a vanquished enemy* (emphasis added).[231]

A contemporary of Lord Mansfield would have recognised this as a reference to ailing French fortunes in India. Looking back, one might have niggling concerns

[229] IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, para 2, in which they related to the Court of Directors what they had learned from letters directly from Fort St George, or indirectly via letters from John Herbert. See further n 235 below.

[230] It is of some interest to note that the most recent reports of the Company to its General Court, at which 'all the Directors' and 'a large Appearance of the Generality' (the shareholders) were present, struck a remarkably positive tone at this time, based on accounts from Fort St George up to mid-August 1759, received by the *Warren*, which had arrived at Kinsale in company with the *Pitt*: see IOR/B/75, Minutes of Meeting of General Court of East India Company, 19 March 1760, 658 ff.

[231] *Carter* (n 1 above) 3 Burr 1905, 1917; 97 ER 1162, 1168. This is perhaps even clearer from Blackstone's abbreviated report of Lord Mansfield's reasoning in 1 Black W 593, 595; 96 ER 342, 344: 'It is said, that, if the insured knows of a design by a privateer to attack a ship, the concealment would be fraudulent. I agree it; but not if designed a year before, and dropped. A design, which had transpired and was dropt, was not likely to be renewed by a vanquished enemy'.

that Lord Mansfield was assuming knowledge that only hindsight could afford[232]: whatever the actual state of the conflict in India in May 1760, it is not obvious that what could then have been known in London would have warranted the assumption that the French were a 'vanquished enemy'. Nevertheless, Lord Mansfield's basic point is clear: viz, that what a London underwriter in May 1760 could know about the Anglo-French conflict would have justified the conclusion that the unimplemented plans of 1758 would not be revived during the policy's term.

G. MATERIAL NON-DISCLOSURE (III): CARTER'S ANTICIPATION OF A FRENCH ATTACK

1. Background

Boehm's third allegation of material non-disclosure also bore on the likelihood of a French attack. On its face, it was the substantially weaker argument that Carter had failed to disclose his anticipation of a French attack. Its evidential basis was the letter sent by Carter to his brother of 22 September 1759, in which he gave his brother his instructions to insure. Carter confessed that he was[233]

> now more afraid than formerly, that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention, last year.

It was this speculation about a possible French attack which, according to Boehm, should have been disclosed.

The meaning of Carter's words only becomes clear in light of Carter's limited knowledge of the course of the Anglo-French conflict in India in 22 September 1759, when he wrote to his brother. By Wynch's letter received on 14 August 1759 via Batavia, Carter knew about the French ships gathered at the Cape of Good Hope over the winter 1758–59.[234] He also had second-hand reports that the siege of Fort St George had ended on 16 February 1759, by which time the French ships and reinforcements had not reappeared off the Coromandel Coast, to relieve the besieging French forces.[235] However, the Fort Marlborough records suggest that that was all. Intelligence of subsequent events—the delayed return of D'Aché's ships to the Coromandel Coast in August 1759, the sea battle between the French and English squadrons on 10 September, and the departure of D'Aché's ships for Mauritius in early October—did not arrive at Fort Marlborough until late December.[236]

Viewed against that background, it is clear that Carter's observations are speculations about the likely movements of the French fleet. In short, his meaning is that

> as [the French fleet] cannot . . . relieve [the French forces on the Coromandel Coast], they may, rather than remain idle, pay us a visit. It seems, that they had such an intention last year.

Carter had evidently inferred from Wynch's letter of 4 February 1759 that the news of French plans to attack Fort Marlborough had come from the French forces at the Cape over the winter 1758–59, and thus that the threat to Sumatra was likely to come from the forces then gathered there. He knew that those ships could not lend early assistance to the French forces on the Coromandel Coast, because of the distance between the Cape and that region. He may also have been assuming that the presence of the English squadron off the Coast might prevent their landing in subsequent months. Whether or not that is right, Carter certainly knew that the arrival of the monsoon season would make it dangerous for either fleet to remain on the Coast much beyond September 1759. On that basis, he appears to have made the further deduction that the French fleet might choose to occupy itself over the summer or autumn months in some other way.

Thus understood, the weakness of Boehm's third allegation should be obvious. The observations allegedly concealed were simply Carter's own speculations about the likely movements of the French fleet, based on dated and incomplete intelligence about the general state of the Anglo-French conflict in the East Indies. By May 1760, when Carter's policy was underwritten, a London insurer could hope to exercise his judgment on the basis of substantially more up-to-date and complete intelligence regarding the circumstances that would bear on the likelihood of the French fleet diverting itself from the conflict on the Coromandel Coast, to surprise the Company's West Coast settlements. This

[232] This problem resurfaces elsewhere in Lord Mansfield's judgment. See esp 3 Burr 1906, 1916; 97 ER 1162, 1168, dealing with the third allegation of non-disclosure: 'It is a bold attempt, for the conquered to attack the conqueror in his own dominions'.

[233] *Carter* (n 1 above) 3 Burr 1905, 1913n; 97 ER 1162, 1166.

[234] See 64, 67–8 above.

[235] See the secret letter sent contemporaneously on the *Pitt*: IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, para 2. This letter reports that they had no more recent news from Fort St George than that conveyed by the *Duke*, which arrived on 9 February 1759, with letters of 31 October 1758: IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 9 February 1759, 40 (diary entry). Their intelligence regarding events on the Coromandel Coast came via John Herbert on 14 August 1759: IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 14 August 1759, 249 (diary entry recording receipt of correspondence from Batavia); *ibid* 15 August 1759, 254 (consultation considering a letter from John Herbert of 5 July 1759, bringing news of raising of siege of Madras).

[236] The next significant intelligence probably came via the *Fort Marlborough*, which arrived on 20 December 1759, with a letter from Fort St George of 7 November 1759: IOR/G/35/70, Diary and Public Consultations—Fort Marlborough, 20 December 1759, 480 (diary entry recording arrival of the *Fort Marlborough*); IOR/G/35/12, Letter from the Secret Committee, Fort St George to the Secret Committee, Fort Marlborough, 7 November 1759, folio 353; IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 20 December 1759, folio 399 (considering the letter). The letter reported an engagement between the English and French ships on 10 September 1759; the disembarkation of land forces by the French at Pondicherry; the departure of the French ships for (it was believed) Mauritius on 2 October 1759; and the departure of the English ships for Bombay on 17 October 1759.

would include: the general course of the Anglo-French conflict; the movements of the French ships that had been at the Cape over the winter of 1758–59 during the summer-autumn of 1759; and the strength of the forces recently dispatched for the East Indies from England and France.

2. The Court's Rejection of the Argument

It cannot be a surprise that Boehm's third allegation failed. Burrows records Lord Mansfield's response as follows[237]:

> This is no part of the fact of the case: it is a mere speculation of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt, for the conquered to attack the conqueror in his own dominions. The practicability of it in this case, depended upon the English naval forces in those seas; which the underwriter could better judge of at London in May, 1760, than the governor could at Fort Marlborough in September, 1759.

According to Blackstone's abbreviated report, Lord Mansfield's answer was that: 'This was a mere speculation of the governor, and not a matter of fact'.[238]

A number of answers can be extracted from these passages, when read in conjunction with the rest of Lord Mansfield's judgment. The first is that Carter's observation was not material to the risk assumed by Boehm. Adopting an objective, 'different risk' standard of materiality, it would be easy to conclude that the risk assessment of a reasonable underwriter, asked to underwrite a policy in London in May 1760, would not be adversely affected by Carter's manifestly unreliable speculations of September 1759. This conclusion would follow a fortiori if what could reasonably be known about the Anglo-French conflict in the London underwriting community by May 1760 would have indicated that there was little or no likelihood of French ships and forces being diverted to surprise the West Coast settlements, as Carter feared.[239] Whether or not this was so, a snapshot of the London papers of the time at least suggests that some of the most recent intelligence would have falsified the premises on which Carter's apprehensions were based. By March 1760, the papers carried reports from French sources of D'Aché's belated return to the Coromandel Coast, the engagement between the English and French squadrons, the landing of troops and supplies at Pondicherry, and the return of D'Aché's damaged ships to Mauritius.[240]

[237] *Carter* (n 1 above) 3 Burr 1905, 1916; 97 ER 1162, 1168.

[238] *Carter* (n 1 above) 1 Black W 593, 595; 96 ER 342, 343.

[239] See the similar assumptions, on which Lord Mansfield appears to reject Boehm's allegation regarding Wynch's letter, discussed at 102–4 above.

[240] See eg *London Chronicle* (27–29 March 1760) 309, col 2 (carrying reports of these events from Paris, based on letters of October 1759 brought by a French frigate); see too *London Chronicle* (8–10 April 1760) 349, col 2. Cf *London Chronicle* (13–15 March 1760) 262, cols 2–3 (extracts of letters from English officers in Pocock's fleet, of 12 and 13 August 1759, still then waiting for D'Aché's arrival). Reliable reports from English sources of these events may not have arrived in London before the end of May: see *London Chronicle* (27–29 May 1760) 518, col 3 (reporting the arrival of the *Diligence* Packet from Madras after a passage of seven months); *London Chronicle* (29–31 May 1760) 521, cols 1–2 (letter from Fort St George of 5 November 1759); *London Chronicle* (31 May–3 June 1760) 529, cols 1–3, 530, cols 1–3 (letter from Vice Admiral Pocock, Madras Road, 12 October 1759); *London Chronicle* (7–10 June 1760) 553, cols 1–2, 554, cols 1–2 (letter from Fort St George of 2 November 1759).

The legal principles stated by Lord Mansfield presented two other insuperable objections to Boehm's third allegation. One was that an insured is not obliged to disclose his own speculations; an insurer is expected to exercise an independent judgment.[241] Another was that an insured is not obliged to disclose matters of 'political speculation' or 'general intelligence', about which an insurer is expected to inform himself.[242] Here, what Carter had allegedly concealed was unquestionably his own speculation, and with one exception, none of the facts on which that exercise of judgment depended were facts of which an underwriter in London in May 1760 could expect to be informed by the insured. They were all facts relating to the general course of the Anglo-French conflict in the East Indies: viz, matters that Lord Mansfield describes as matters of 'political speculation' or 'general intelligence'. The one exception was the letter received by Carter from Wynch on 14 August 1759, reporting the French plans of 1758. On its face, Carter's speculation relied heavily on this letter. Nevertheless, this could not render that speculation a matter that ought to have been disclosed to Boehm. Instead, Carter's failure to disclose the existence and contents of the letter could and did provide the basis for the independent allegation of non-disclosure, already considered.

H. MATERIAL NON-DISCLOSURE (IV): CARTER'S GROUNDS FOR APPREHENDING A DUTCH WAR

1. Background

A fourth allegation of non-disclosure was raised by Lord Mansfield, rather than by Boehm's counsel.[243] It principally rested upon an inference drawn from Roger Carter's letter to his brother of 22 September 1759, by which the request for insurance was made. Carter reportedly commented that 'in case of a Dutch war, I would have it (the insurance) done at any rate'.[244] This showed, Lord

[241] This is reported in different terms. According to Burrows' report, at 3 Burr 1905, 1910 and 1911; 97 ER 1162, 1165: '[t]he under-writer . . . needs not be told general topics of speculation'; further '[m]en argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judgment are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other'. According to Blackstone's report, at 1 Black W 593, 594; 96 ER 342, 343, 'as men reason differently from the same facts, he need not be told another's conclusion from known facts'.

[242] See further 109 below.

[243] *Carter* (n 1 above) 3 Burr 1905, 1917; 97 ER 1162, 1168.

[244] *Carter* (n 1 above) 3 Burr 1905, 1917n; 97 ER 1162, 1168n.

Mansfield concluded, that Roger Carter was then 'principally apprehensive of a Dutch war',[245] and yet he had neither disclosed that apprehension, nor the grounds on which it rested, to the insurer.

Lord Mansfield was unable to identify the specific grounds for Carter's apprehension, in the absence of argument on the point. However, surviving contemporary sources offer important insights into what they might have been. The Dutch Company had long been the English Company's major commercial rival in this region,[246] and the Company's surviving records reveal that relations between the West Coast servants and their Dutch neighbours were often strained. Indeed, they indicate that from the outset of Carter's period as Deputy Governor, the Company's servants at Fort Marlborough were complaining bitterly of local Dutch interference with their shipping and trade.[247] Properly understood, however, Carter's fear of a 'Dutch war' in September 1759 had a different basis. It was not the long-standing local commercial rivalry, but rather, the very recent intelligence of a substantial Dutch armament being prepared at Batavia, the Dutch Company's HQ in the East Indies. This intelligence came via two letters from John Herbert, the Company's agent there, which arrived at Fort Marlborough on 14 August 1759.[248] Their contents were summarised by Carter and Preston, in their secret letter of 16 September 1759.[249]

> [The letters conveyed] intelligence of an Armament the Dutch were sending from Batavia, to consist, when reinforced at Ceylon, of 600 Europeans & 1600 Bugganeese, given out to act as Auxiliaries on the Coast of Coromondel, & protect their Settlements from the injuries of the French; but generally believed, to be real[l]y intended for Bengal, to reestablish their trade there, or possibly to create troubles, which may prove prejudicial to your Honors Concerns in that Kingdom.

The report of the Dutch scheme was broadly accurate. In the wake of Clive's victory at Plassey in 1757, the English Company's influence in the rich province of Bengal had greatly increased. In 1759, the Dutch Company did indeed dispatch a substantial force to Bengal, in an effort to resurrect its commercial fortunes there. The expedition was nevertheless short-lived. It ended in catastrophic failure.[250]

[245] *Carter* (n 1 above) 3 Burr 1905, 1917; 92 ER 1162, 1168.
[246] See 60–61 above.
[247] See, eg IOR/G/35/11, Letter from Fort Marlborough to Fort St George, 14 June 1758, folio 345 ff, para 6; *ibid* Letter from Roger Carter to Fort St George, 14 June 1758, folio 362 ff, para 3; *ibid* Letter from Fort Marlborough to the Court of Directors, 31 December 1758, folio 408 ff. See too the continuing complaints evident at the time of the *Pitt's* departure: IOR/G/35/12, Letter from Fort Marlborough to the Court of Directors, 21 September 1759, folio 302 ff.
[248] IOR/G/35/12, Letter from John Herbert to Fort St George, 16 June 1759, folios 280–81; *ibid* 5 July 1759, folios 281–3.
[249] IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, para 7.
[250] The Dutch scheme is noted in, eg F Gaastra, 'War, Competition and Collaboration: Relations between the English and Dutch East India Companies in the Seventeenth and Eighteenth Centuries' in HV Bowen et al (eds), *The Worlds of the East India Company* (Rochester, The Boydell Press, 2002) 59.

However reliable, John Herbert's letters did not suggest any imminent Dutch threat to Fort Marlborough from the armament. Nor, more importantly, were they taken to imply such a threat, when they came to be considered by the Fort Marlborough Secret Committee at its meeting of 22 August 1759.[251] The direct threat was perceived to be in Bengal, and on the basis that John Herbert had already taken steps to ensure that the Company's servants there were apprised of the armament, the Committee resolved that no further action was necessary.[252] Properly understood, the heightened state of alert at Fort Marlborough first signalled in the August meeting, and the special precautions immediately taken against enemy attack, had the different basis already noted.[253] They were the result of Wynch's letter, and its forewarnings of a French attack, which Roger Carter had received by the same secret packet from Batavia on 14 August 1759.[254] Lord Mansfield's summary of the contents of Carter's letter to his brother in *Carter v Boehm* indicates that Carter's insurance instructions were primarily the result of the same apprehension.[255]

2. The Court's Rejection of the Argument

The fourth allegation of material non-disclosure was superficially the strongest, as Lord Mansfield acknowledged. In September 1759, Carter unquestionably had grounds for fearing a Dutch war, which were not disclosed to the insurer, and it would be difficult to dispute their materiality to the risk undertaken. Lord Mansfield nevertheless had no doubts that the allegation should be rejected. Unaware of the source of Carter's fears, he speculated that the grounds must have comprised 'political speculation' and 'general intelligence',[256] which both sides agreed did not have to be disclosed to an insurer.[257]

The surviving contemporary sources indicate that this was an inspired speculation. The Dutch armament at Batavia which provided the undisclosed grounds

[251] IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 22 August 1759, folio 267v (reciting the reading of John Herbert's letters of 16 June and 5 July 1759).
[252] Confirmed by IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, para 8.
[253] See 65–72 above.
[254] See IOR/G/35/12, Minutes of the Secret Committee, Fort Marlborough, 22 August 1759, folios 267–69; IOR/G/35/12, Letter from Roger Carter and Richard Preston, Fort Marlborough, to the Secret Committee of the Court of Directors, 16 September 1759, folio 287 ff, paras 7–9 (dealing with the news of the Dutch armament), paras 10–19 (reporting the letter from Wynch, and the special measures which had been taken to prepare Fort Marlborough for the possibility of a French attack).
[255] See *Carter* (n 1 above) 3 Burr 1905, 1913n; 97 ER 1162, 1166: 'The latter letter (to his brother) owns that he is "now more afraid than formerly, that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention, last year." And therefore he desires his brother to get an insurance made upon his stock there'.
[256] *Carter* (n 1 above) 3 Burr 1905, 1917–18; 97 ER 1162, 1168.
[257] *Carter* (n 1 above) 3 Burr 1905, 1918; 97 ER 1162, 1168.

for Carter's apprehension could not have been public knowledge in London in late September 1759, when the *Pitt* set sail from Fort Marlborough with Carter's insurance instructions. However, it could be and was public knowledge in London when the insurance policy was effected, eight months later, in May 1760. In early March 1760, London papers contained reports of the armament from a source which should not come as a surprise: the *Pitt*, which had arrived at Kinsale in Ireland on 23 February 1760.[258] The reports indicate that the *Pitt*'s crew learned of the armament when she put into Batavia on her return journey from China in late August 1759,[259] shortly before her arrival at Fort Marlborough on 2 September 1759.

I. FRAUDULENT AVOIDANCE BY THE INSURER

Having rejected the four particular allegations of material non-disclosure, and having acquitted Carter of any fraudulent intention, Lord Mansfield raised one final, overriding objection to Boehm's attempt to resist liability. If he could avoid liability for Carter's material non-disclosure, Lord Mansfield said, a rule designed to encourage good faith and prevent fraud would become an instrument of fraud. Burrows' report records Lord Mansfield's reasoning in the following terms[260]:

> The reason of the rule against concealment is, to prevent fraud and encourage good faith.
>
> If the defendant's objections were to prevail, in the present case, the rule would be turned into an instrument of fraud.
>
> The underwriter, here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question.
>
> If the objection 'that he was not told' is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence, 'that, if the worst should happen, he had provided against total ruin;' knowing, at the same time, 'that the indemnity to which the governor trusted was void.'
>
> There was not a word said to him, of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void; if he dispensed with the information, and did not think this silence an objection he cannot take it up now, after the event.

[258] IOR/L/MAR/B/525, index to the marine records for the *Pitt*.
[259] See, esp *London Evening Post* (11–13 March 1760) 1, col 2.
[260] *Carter* (n 1 above) 3 Burr 1905, 1918–19; 97 ER 1162, 1169.

> What has often been said of the Statute of Frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud—'That it should never be so turned, construed, or used, as to protect, or be a means of fraud.'

These passages are difficult to interpret, yet a great deal potentially turns on them. Lord Mansfield was clearly assuming that an insurer's failure to inquire may debar him from avoiding liability for material non-disclosure vis-à-vis an honest insured. Less clear is when Lord Mansfield envisaged that being the case. Three very different analyses are available, with dramatically different consequences for the balance of the law between insured and insurer. Any conclusion regarding *Carter v Boehm*'s ultimate orientation depends heavily on which is preferred.

The first analysis, lying at one extreme, is that Lord Mansfield meant that an insurer cannot avoid liability where he failed to inquire of his insured, knowing that the insured might have knowledge on a particular subject and yet had disclosed nothing.[261] In practice, if accepted, this analysis would always or almost always compel an insurer to make inquiry of his insured. It thus comes dangerously close to reversing what has consistently been assumed to be the law's starting-point, implicit in Lord Mansfield's statement of the law: viz, that a prospective insured is obliged to disclose material facts known to him, and that this means obliged without inquiry.[262] Marshall, writing 200 years ago, saw this[263]:

> Upon whom does the obligation lie; the insured to disclose what he knows, or the underwriter to fish it out by questioning the broker or agent? The argument goes to prove, that if the underwriter ask no questions, the insured is obliged to disclose nothing; which is true only with respect to matters of public notoriety

For this reason alone, this radical first interpretation seems impossible to accept.

A second analysis, lying at the opposite extreme, is that Lord Mansfield meant only that an insurer cannot avoid liability where his failure to inquire is shown to be fraudulent. No one would dispute that an insured's obligation to disclose material facts should not be a cloak for dishonest conduct by insurers. The difficulty with this second analysis is different: viz, its application in *Carter*

[261] This was apparently Marshall's reading: Marshall, *A Treatise on the Law of Insurance* (n 103 above) 483 fnn, where a succession of criticisms of Lord Mansfield's final words are offered in the notes: 'It is here assumed that the underwriter knew that the policy was void.—How could he know that it was void by reason of a concealment, without knowing what was concealed? Upon whom does the obligation lie; the insured to disclose what he knows, or the underwriter to fish it out by questioning the broker or agent? The argument goes to prove, that if the underwriter ask no questions, the insured is obliged to disclose nothing; which is true only with respect to matters of public notoriety—. . . How could he judge of the omission, without knowing what was omitted?—. . . How could he be supposed to dispense with information when the silence of the insured was, according to all practice, a proof that he had none to communicate?'.
[262] See for a clear early statement of an insurer's legitimate position of passivity, see *Bridges v Hunter* (1813) 1 M & S 15, 18; 105 ER 6, 7 (Lord Ellenborough CJ).
[263] Marshall, *A Treatise on the Law of Insurance* (n 103 above) 483 fn.

v Boehm required some controversial factual assumptions, remarkably adverse to the insurer. In his judgment, Lord Mansfield unquestionably emphasises circumstances that should have afforded Boehm reason to suspect that the insured had failed to disclose some material matter. However, it is a large leap from there to the conclusion that Boehm fraudulently failed to inquire: viz, that Boehm knew that the insured had not disclosed some material matter, and that that non-disclosure would entitle him to avoid liability, and yet he had deliberately failed to inquire with the dishonest intention of profiting in all events.

A third analysis, lying between these extremes, is that an insurer cannot avoid liability vis-à-vis an honest insured where he consciously failed to inquire of the insured, in circumstances where he had reasons to suspect that a material matter had not been disclosed.[264] Support for this analysis can be found in passages indicating that Boehm's failure to inquire would have the same consequence, whether or not he had any fraudulent intention[265]:

> If he thought [the omission to disclose] an objection at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void; if he dispensed with the information, and did not think this silence an objection; he cannot take it up now, after the event.

Consistently with Lord Mansfield's express words, this third analysis can be understood as a principle designed to prevent 'fraud' in two senses.

First, a principle depending only on proof of a failure to inquire, despite reasons to suspect non-disclosure, might be appropriate to avoid any risk that the law might be exploited by insurers who were in fact guilty of fraudulent non-inquiry. Arguably, Lord Mansfield's earlier statements, in which he appears to accuse Boehm of dishonesty, were only intended to present a hypothetical: viz, that if insurers in Boehm's position could avoid liability by pleading 'I was not told', the law might become a tool for the dishonest to achieve their ends.

Secondly, the same principle might be warranted to prevent 'fraud' in a broader sense. It is evident that Lord Mansfield was concerned that an honest insured, of whom inquiry might be made but is not, will afterwards conduct his affairs on the assumption that his policy is valid, and that he has effectively hedged his risks. Thus Lord Mansfield observes in the passage quoted that Boehm, by his failure to inquire, 'drew the governor into a false confidence, "that if the worst should happen, he had provided against total ruin"'.[266] It might be inferred from this that Lord Mansfield was at least partly concerned to avoid the injustice arising if an insurer could rely on his insured's honest failure to disclose material facts to avoid liability and compel the insured to bear the

[264] This limitation is implicit in Lord Mansfield's earlier statement of principle: see *Carter* (n 1 above) 3 Burr 1905, 1911; 97 ER 1162, 1165. Good faith, he said, prevented an insured holding an insurer to a contract, where he had failed to disclose material facts which he knew, but of which the insurer was ignorant, *and had no reason to suspect*.

[265] *Carter* (n 1 above) 3 Burr 1905, 1911, 1918–19; 97 ER 1162, 1169.

[266] See *Carter* (n 1 above) 3 Burr 1905, 1918; 97 ER 1162, 1169.

risk of loss, where the insurer's failure to inquire (despite reasons to suspect non-disclosure) had denied the insured the opportunity of correcting his omission and ensuring the policy's validity.

The wider interest of this intermediate analysis of Lord Mansfield's words lies in its relationship with the modern law. Today, an insurer's failure to inquire of a prospective insured may certainly prevent the insurer from avoiding liability, via the objection that the insurer has waived disclosure of the relevant matters. Understandably, however, this exception has been carefully policed by the courts: over-hasty findings of 'waiver of disclosure' following an insurer's failure to inquire would threaten fatally to undermine the primacy of the insured's obligation to disclose.[267] Unfortunately, the courts have not found it easy to identify where the dividing line should be drawn. The prevailing approach today appears to involve an inquiry as to whether the insured's presentation of the risk, on its own or in conjunction with such other facts as the insurer knows or is presumed to know, should have raised a suspicion in the mind of a reasonable insurer that some material fact had not been disclosed. Where this is so, and the insurer fails to make such inquiry of the insured as a reasonably careful insurer would make, he will be held to have waived disclosure of any material fact that such inquiry would reveal.[268] Thus formulated, the 'waiver of disclosure' exception can initially appear broad, but in practice, its application is very much restricted by the primacy of the insured's obligation to disclose. Other things being equal, an insurer can assume that the insured has performed his obligation, and fairly represented the risk. And other things being equal, therefore, he can assume that no information has been withheld that would materially affect the risk as represented. Additional circumstances must suggest that that assumption is illegitimate.

In recent litigation, Lord Mansfield's closing remarks in *Carter v Boehm* have been resurrected in support of a very expansive interpretation of the exception for waiver of disclosure.[269] Such arguments failed. One response was that *Carter v Boehm* was a decision turning on its own facts. Another was that the law has moved on since 1766. The apparent assumption is that modern courts, being more inclined to emphasise the primacy of an insured's obligation to disclose, and more sensitive to the insurance practices that have been shaped by it, are now less willing than Lord Mansfield may have been to allow a failure to inquire to defeat an insurer's allegation of non-disclosure. This possibility

[267] See, classically, *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65 (CA) 72 (Lord Hansworth), 85–7 (Scrutton LJ), 89 (Sargant LJ).

[268] See *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd (No 1)* [1984] 1 Lloyd's Rep 476 (CA) (esp Parker and Stephenson LJJ); *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430 (Longmore J), [1997] 1 Lloyd's Rep 225 (CA); *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 Lloyd's Rep 483.

[269] See esp the treatment of counsel's arguments in *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430 (Longmore J), [1997] 1 Lloyd's Rep 225 (CA), and again in *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 Lloyd's Rep 483.

certainly cannot be ruled out. However, re-examination of *Carter v Boehm* in its context, and of Lord Mansfield's judgment as a whole, suggests that any gap between now and then is narrower than it might appear.

If the question is asked, whether a reasonably careful insurer would have inquired about the state of Fort Marlborough's fortifications, a combination of several circumstances might strongly suggest an affirmative answer. First, Lord Mansfield assumed that Boehm knew that Carter might be duty-bound not to disclose Fort Marlborough's defensive state in September 1759. No insurer having this knowledge could have safely proceeded on the assumption that if Carter had any adverse knowledge, he would have volunteered it. Secondly, Lord Mansfield also assumed that Boehm knew or might reasonably be expected to know of the character of the Company's establishments in the East Indies, and more particularly, that Fort Marlborough was only designed to withstand native attack. No insurer having this knowledge could reasonably assume that Fort Marlborough was in a state to withstand a European attack, without further inquiry. Thirdly, even without such knowledge, the nature of the insurance request, taken together with the form of the policy underwritten, might be sufficient to raise a similar suspicion. As we have seen, Carter's request was for a policy covering his stock-in-trade at Fort Marlborough against loss in a European enemy assault. It might be inferred from this that the place was thought indefensible. This inference might be reinforced by the circumstance that the policy underwritten rendered the insured sum payable in full and without further inquiry in the event of such an assault.

If the similar question is asked, whether a reasonably careful insurer would have inquired whether Carter knew facts bearing on the likelihood of a European enemy attack, which he had not disclosed, an affirmative answer might also be reached. Once again, the nature and timing of the insurance request seems fundamentally important. The policy was not such as would be effected in the ordinary course of business, against ordinary perils. It appears to have been a policy insuring only against European enemy attack, for a premium that represented a very substantial sum of money. Lord Mansfield certainly regarded the policy as exceptional, even unique.[270] Once this is appreciated, it is easier to accept that the insurer ought to have suspected that circumstances known to Carter, but not disclosed, gave him special cause to fear that such attack might occur. Other circumstances might suggest the same, or would at least suggest that a London underwriter could not reasonably assume, from Carter's silence, that he had no particular reasons for fearing a European enemy attack. Prime amongst these would be the circumstance that the request came

[270] See esp *Carter* (n 1 above) 3 Burr 1905, 1912; 97 ER 1162, 1165, where in the context of the dealing with the public policy objection to the policy's validity, Lord Mansfield observes that insurance of this nature 'so seldom happens, (I never saw one before)'. See also 3 Burr 1905, 1918; 97 ER 1162, 1168, where Lord Mansfield rejects the broker's evidence as to how the underwriters would have reacted to disclosure, on the basis that it was an opinion 'without the least foundation from any previous precedent or usage'.

against the background of direct conflict in the East Indies between England and France, a conflict about which the insured, resident in the East Indies, might initially be better placed to know than a London underwriter.

J. THE PUBLIC POLICY OBJECTION

It is unlikely to be noticed today that Lord Mansfield also raised a preliminary objection to Carter's claim that did not go to non-disclosure at all. This was that the policy might be void on grounds of public policy:

> [a]n objection occurred to me at the trial, 'whether a policy against the loss of Fort Marlborough, for the benefit of the governor, was good;' upon the principle which does not allow a sailor to insure his wages.[271]

At first sight puzzling, Lord Mansfield's meaning here is revealed by the analogy he draws with the law's treatment of sailors' wages. When *Carter v Boehm* was decided, merchant sailors' wages were structured in a manner that incentivised their doing their utmost for the security of the ship and cargo.[272] Governed by the maxim that 'freight is the mother of wages', no wages might follow in the event of loss of the ship by wreck or capture,[273] a harsh conclusion sometimes expressly rationalised on the basis that

> if the mariners shall have their wages in these cases, they will not use their best endeavours to hazard their lives to preserve the ship.[274]

This risk was considered so significant that a statute then in force actually prohibited the payment of more than half of the wages due to seamen on a merchant ship, before the ship's safe return to Great Britain or Ireland.[275] On the same basis, and as Lord Mansfield must have been aware, it was a common feature of maritime laws at this time that a sailor could not insure his wages,[276] on the basis that an insurance 'safety-net' might produce the same undesirable disincentives. Lord Mansfield rightly recognised that this analogy suggested that

[271] *Carter* (n 1 above) 3 Burr 1905, 1912; 97 ER 1162, 1165; (1766) 1 Black W 593, 594; 96 ER 342, 343.

[272] See eg P Earle, *Sailors—English Merchant Seamen 1650–1775* (London, Methuen, 2007) ch 3, esp 31–8 (but note the custom in certain trades of paying a proportion of the pay in advance).

[273] In effect, it seems to have been an implied condition of the seaman's contract with the shipowner that wages were dependent on the earning of freight: eg *Arnould on the Law of Marine Insurance* (n 142 above) § 244.

[274] Earle, *Sailors* (n 272 above) 36–7 (quoting a contemporary source).

[275] 8 Geo I c 24, s 7.

[276] See earlier, esp N Magens, *An Essay on Insurances* (London, Haberkorn, 1755) vol 1, § 19 (where the effect of maritime ordinances of Amsterdam, Rotterdam and Stockholm, collected in vol 2, is summarised). For later accounts of English law, eg Park, *A System of the Law of Marine Insurances* (n 103 above) 11–12; Marshall, *A Treatise on the Law of Insurance* (n 103 above) vol 1, 89–91. Cf also BM Emerigon, (trans) S Meredith, *A Treatise on Insurances* (London, J Butterworth, 1850) 191–2 (describing the effect of French ordinances, and noting their coincidence with rules of Antwerp and Amsterdam).

Deputy Governor Carter should not be permitted to insure against the loss of Fort Marlborough to a European enemy, for his own benefit. The 'safety-net' of insurance might similarly reduce the incentive of persons occupying his position to take resolute steps for the defence of the place.

Lord Mansfield ultimately resisted this analogy, and dismissed the objection.[277] Unpacked, his conclusion rested on the following substantial considerations. First, it was unlikely the safety of Fort Marlborough would be significantly affected by Carter's acts or omissions. By implication, the case was therefore unlike that of a ship, whose safety inevitably depends on its crew's resolute conduct.[278] Secondly, the law did not consistently reflect the policy that dictated that insurance policies insuring sailors' wages should be invalid. A ship's captain could insure his cargo onboard, or if part-owner of the vessel, could insure his share; similarly, the captain of a privateering vessel could insure his share in the profits of the venture. Thirdly, as a policy of this type was extremely rare, it was unlikely that any mischief would follow by example as a result of its being allowed to stand. Finally, it would not be just to allow the insurer, who took the premium knowing of the insured's status, subsequently to overturn the policy on the basis that that status precluded him from insuring.

K. CONCLUSION

There can be no questioning *Carter v Boehm*'s landmark status in the development of the law of non-disclosure between parties to an insurance contract. The detailed historical re-analysis undertaken in this chapter enables us to see more clearly why it warrants that status, and why, almost 250 years later, it still deserves to be remembered. It was absolutely not a pro-insurer decision, and we are now better placed to see why. Any contemporary law reformer, concerned for the modern law's shape and balance, might usefully reflect on three particular aspects of the judgment.

First, pervading Lord Mansfield's judgment is the overriding necessity for an inequality of accessible information between insurer and insured, which leads the insurer to depend on disclosure by his prospective insured. This necessity is clear from Lord Mansfield's preliminary exposition of the normative basis for requiring a prospective insured to disclose material facts, and for allowing his insurer to avoid liability where he does not. It underpins Lord Mansfield's unprecedented account of the circumstances in which an insurer cannot complain of non-disclosure, most of which can be derived from those normative underpinnings. It underpins Lord Mansfield's general account of the context in which Carter's policy was effected, the clear purpose of which was to emphasise that there was no significant inequality of accessible information in the case at hand. Finally, and perhaps most importantly, it was the absence of any significant inequality of accessible information that ultimately lay at the heart of the failure of Boehm's particular allegations of material non-disclosure.

Thus, we can now see that one reason why Boehm's allegations failed was that, in light of what the insurer knew or ought to have known when the policy was effected, the facts allegedly concealed would not have adversely affected a reasonable insurer's risk assessment. In another instance, the answer was that the facts allegedly concealed were matters of general public notoriety, no less accessible to the insurer than to the insured. In yet another instance, the answer was that what was allegedly concealed was the insured's own speculation, and that the law's role was properly limited to correcting inequalities of information on which an insurer's judgement is to be exercised; it did not extend to correcting disparities in the parties' skill and judgement. A final, overriding objection was that the insurer had failed to take advantage of means of information available to him, in the form of inquiry of the insured or of some other source, when what he knew or ought to have known should have compelled the conclusion that he had not been fully informed, and that such inquiries were required.

Secondly, pervading Lord Mansfield's judgment is also the premise that standards of good conduct apply, in some form or other, to both parties to an insurance contract. Lord Mansfield expressly recognised that an insurer owed his insured a corresponding obligation to disclose material facts. Even more significantly in practice, the law regulating the insured's obligation and its consequences would not be allowed to become a cover or excuse for fraud, nor even for negligence. Insurers could not expect to be wholly passive recipients of all information necessary to estimate the risk being undertaken. They would be expected to know, or inform themselves of, certain types of information not peculiarly in the insured's knowledge, in the ordinary proper conduct of their business. And even in the case of information not of this type, any insurer who failed to take advantage of means of information available to him, where the circumstances ought to have suggested that he could not assume that he had been fully informed, did so at his peril. In both of these respects, Lord Mansfield's judgment reflects some very robust findings, adverse to Boehm, the insurer. The resulting signals to the underwriting community ought to have been unmistakable.

Finally, also pervading Lord Mansfield's judgment is the premise that courts must be sensitive to the law's impact on honest insureds. It is very clear that Lord Mansfield regarded Carter as an honest man, who did not appreciate that the facts not disclosed were significant and/or considered himself duty-bound not to disclose them. It would be inconsistent with Lord Mansfield's initial statements of the law to claim that he thought that either of these circumstances alone would excuse the insured's failure to disclose material facts: he expressly held that even accidental non-disclosure would entitle the insurer to avoid liability. Nevertheless, Lord Mansfield's judgment does disclose a sensitivity to the unfortunate consequences

[277] *Carter* (n 1 above) 3 Burr 1905, 1912; 97 ER 1162, 1165.

[278] Though Lord Mansfield does not say this in *express* terms, it is the interpretation that may make most sense of the observation that 'this place, though called a fort, was really but a factory or settlement for trade . . . and he, though called a governor, was really but a merchant': *Carter* (n 1 above) 3 Burr 1905, 1912; 97 ER 1162, 1165.

that would follow, if insurers were allowed too readily to avoid liability vis-à-vis honest insureds, who have arranged their affairs on the assumption that their risks have been hedged. At the most general level, this sensitivity is evident in the close scrutiny to which Lord Mansfield subjected each of the insurer's allegations of non-disclosure, and his apparent readiness to make factual findings or assumptions adverse to the insurer's interest.

At a more specific level, it is also evident in Lord Mansfield's assumption that an insurer could not be permitted to avoid liability vis-à-vis an insured who had honestly failed to disclose, where the insurer could not reasonably assume that he had been fully informed, and where his failure to inquire had deprived the insured of all opportunity of correcting the omission. It is evident in Lord Mansfield's subtle discussion of whether Carter's policy should be void on public policy grounds. And it is no less evident in Lord Mansfield's readiness to conclude that Boehm had assumed the burden of inquiry into Fort Marlborough's condition, in light of his knowledge that Carter might be duty-bound to keep it secret.

4

Da Costa v Jones (1778)

WARREN SWAIN

A. INTRODUCTION

IN TOBIAS SMOLLETT'S novel *The Adventures of Ferdinand Count Fathom*, the Count describes a visit to a London gaming house[1]:

> In one corner of the room might be heard a pair of lordlings running their grandmothers against each other, that is, betting sums on the longest liver; in another, the success of the wager depended upon the sex of the landlady's next child; and one of the waiter's happening to drop down in apoplectic fit, a certain noble peer exclaimed 'Dead, for a thousand pounds!' The challenge was immediately accepted; and when the master of the house sent for a surgeon to attempt the cure, the nobleman who set the price upon the patient's head, insisted upon his being left to the efforts of nature alone, otherwise the wager should be void.

Wagering was a popular pastime amongst all social classes in 18th century England.[2] The wagers witnessed by Count Fathom were of a common type,[3] but wagers came in many different guises. An anecdote from 1709 recalls how four Members of Parliament raced their hats in a river and

> ran halloing after them; and he that won the prize was in greater rapture than if he carried the most dangerous point in Parliament.[4]

According to one witness, wagers 'very frequently . . . originate over the bottle or porter pot'.[5] Some were certainly bizarre. One reader in *The Spectator* in

[1] T Smollett, *The Adventures of Ferdinand Count Fathom* (London, W Johnston, 1753) 126.

[2] Anon, *An Essay on Gaming* (London, 1761) 2; WS Lewis (ed), H Walpole, *Horace Walpoles's Correspondence*, vol 24 (Oxford, Oxford University Press, 1967) 55, 11 November 1774 to Sir Horace Mann. For later accounts, see J Ashton, *The History of Gambling in England* (London, Duckworth, 1898) 150–72; P Langford, *A Polite and Commercial People* (Oxford, Oxford University Press, 1992) 571–4.

[3] G Clark, *Betting on Lives: The Culture of Life Insurance in England 1695–1775* (Manchester, Manchester University Press, 1999) 50–51. Clarke took a sample from the betting book of White's Club in London between 1743–52: 35% of wagers related to death, 17% to birth and 10% to marriage.

[4] J Malcolm, *Anecdotes of the Manners and Customs of London During the Eighteenth Century* (London, 1808) 132.

[5] *Ibid* 161.